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# In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

*v.*

UNITED STATES GYPSUM COMPANY, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 556 F. 2d 115. The principal opinion of the district court (Pet. App. 75a-94a) is reported at 383 F. Supp. 462. Other opinions of the district court (I A. 40-41, 42-44, 52-59)[1] are not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 71a-72a) was entered on January 6, 1977. A timely

[1] "I A.," "II A.," and so on designate, by volume, the Appendix filed in this Court.



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petition for rehearing was denied on March 10, 1977 (Pet. App. 73a–74a). On March 29, 1977, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 9, 1977. The petition was filed on that date and was granted on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether competitors charged with what would otherwise be an unlawful exchange of price information may defend by arguing that the exchange might help them to establish a "meeting competition" defense to a charge of price discrimination.

2. Whether the district court adequately instructed the jury concerning the rules for establishing each defendant's involvement in the conspiracy, and concerning the conduct required to withdraw from a conspiracy.

3. Whether the district court coerced the jury into reaching a verdict.

## STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.



Section 2 of the Robinson-Patman Act, 49 Stat. 1526, as amended, 15 U.S.C. 13, provides in relevant part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the [Federal Trade] Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an

equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce knowingly to induce or receive a discrimination in price which is prohibited by this section.

## STATEMENT

After a 19-week trial, respondents were convicted of conspiring to fix the prices and terms of sale of gypsum board, in violation of Section 1 of the Sherman Act. The statement of the evidence that follows is presented, as it must be, in the light most favorable to the prosecution. See *Glasser v. United States*, 315 U.S. 60, 80.

### A. PRETRIAL PROCEEDINGS

On December 27, 1973, six corporations that manufacture gypsum board, and the officials of those corporations were charged in an indictment filed in the United States District Court for the Western District of Pennsylvania with violations of Section 1 of the Sherman Act (I A. 31–36). The indictment charged that the defendants, as part of a conspiracy beginning before 1960 and continuing until 1973 agreed to and did: (a) raise, fix, maintain and stabilize the prices of gypsum board, (b) fix, maintain and stabilize the terms and conditions of sale of gypsum board, and (c) adopt and maintain uniform methods of packaging and handling gypsum board.



The indictment charged that the defendants and their co-conspirators (two other manufacturers and the Gypsum Association) used 13 means to carry out the conspiracy (I A. 34–35). The means included: adopting agreed-upon price increases, terms and conditions of sale, and uniform methods of packaging and delivery; exchanging information on prices, terms of sale, and delivery practices in order to ascertain deviations from the agreed-upon terms and to avoid undercutting each other on discounts that were granted; and engaging in predatory practices to eliminate or contain competition from smaller producers. The indictment also alleged that the conspirators were successful in fixing and stabilizing prices and terms of sale, and in eliminating competition on delivery practices (I A. 35–36). A bill of particulars (I A. 37–39) elaborated on the indictment.

The district court denied defendants' motion to quash the indictment because of pre-indictment delay (Pet. App. 75a–94a). The court concluded that the delay, although lengthy, was justified by the need to investigate concealed events and assemble voluminous evidence.[2] Two corporate and seven individual defendants then

[2] In light of its conclusion that the delay was justified, the court found it unnecessary to consider at length defendants' argument that they had been prejudiced (Pet. App. 90a–91a). See *United States* v. *Lovasco*, 431 U.S. 783.

pleaded *nolo contendere*.[3] Respondents[4] elected to be tried before a jury.

### B. THE GYPSUM INDUSTRY AND ITS PRACTICES

#### 1. THE INDUSTRY STRUCTURE

Since World War II gypsum board has replaced gypsum plaster as the primary material for internal walls of all types of buildings (II A. 1016; C.A. App. 306a–307a).[5] Approximately $5.1 billion was spent for gypsum board between 1960 and 1973 (II A. 807–808; IV A. 2249). Demand for gypsum is determined primarily by the level of housing construction and therefore fluctuates over time (II A. 1016–1017). Because the cost of gypsum board is only a small part of the cost

[3] The two corporate defendants that pleaded *nolo contendere*, Kaiser Gypsum Co. and The Flintkote Co., were fined $50,000 each. The individual defendants, Graham J. Morgan, chairman of the board of United States Gypsum Co.; William H. Hunt, president of Georgia-Pacific Corp.; William D. Herbert, president of Celotex Corp.; Claude E. Harper and Robert A. Costa, president and vice-president of Kaiser; and George J. Pecaro and James D. Moran, chairman of the board and president of Flintkote, were fined and given suspended sentences of imprisonment. Morgan, Hunt, and Harper were fined $40,000, and the others $20,000 (Pet. App. 4a, 5a, nn. 3 and 4). Before the district court accepted the pleas of *nolo contendere*, it denied a motion to take the pleas *in camera* and to impound the results until the conclusion of the trial of the remaining defendants (I A. 40–41).

[4] United States Gypsum Co. (USG) and Andrew J. Watt, its executive vice-president; National Gypsum Co., Colon Brown, its chairman of the board, and Jay P. Nicely, then its vice-president of sales; the Georgia-Pacific Corp.; and the Celotex Corp.

[5] "C. A. App." refers to the joint appendix in the court of appeals.



of a building, demand is not significantly affected by short-run changes in price (II A. 1017).

Gypsum board is fungible. The basic product, called "plain vanilla" board, is substantially the same no matter which company makes it, and users select one brand over another on the basis of differences in price, credit terms, and delivery services (I A. 193–194, 215–216; II A. 940–941, 1013–1014).

The gypsum board industry is highly concentrated. The corporate respondents, which are the four largest manufacturers, accounted for 75 percent of national sales during 1960 to 1973; the eight largest companies (the corporate respondents and the corporate co-conspirators) accounted for 94 percent of national sales (II A. 808–809; IV A. 2249). Each of these firms operated numerous widely-scattered plants to serve the many geographic markets in which they operated[6] (IV A. 2262–2264; Tr. 1416–1418).[7]

Seven other firms, the "single plant producers," each operated a single manufacturing facility and generally marketed within 500 miles of the plant (IV A. 2262–2264; C.A. App. 319a, 656a). They accounted for the remaining six percent of national sales. The single plant producers emerged in the late 1950s and early 1960s. They usually endeavored to enter a local market by offering the buyers (building supply and

[6] Gypsum board is heavy, and transportation costs are large enough to require each major manufacturer to maintain plants throughout the nation. Because of transportation costs, and for other reasons, not all major producers were effective competitors in all parts of the country (Tr. 1372; C.A. App. 656a–657a).

[7] "Tr." refers to the transcript of the trial.

lumber dealers) some economic advantage: either a lower price or delivery to the customer's warehouse or the construction site (I A. 202; C.A. App. 889a, 935a).

2. THE INDUSTRY TRADE ASSOCIATION

The Gypsum Association was established in 1930 as a trade association of gypsum board manufacturers (C.A. App. 299a–301a). Except Johns-Manville, all of the corporate conspirators named in the indictment were members (I A. 107; C.A. App. 319a–320a).[8] The Gypsum Association held semi-annual meetings (C.A. App. 321a, 328a) attended by most of the individual defendants and other top sales and pricing officials of the corporate defendants.[9]

[8] Johns-Manville did not become a producer of gypsum board until 1968, when it acquired four plants in the west from Fibreboard, which went out of business (Tr. 4653–4654). Prior to that, however, it marketed gypsum board under a private label arrangement with Georgia-Pacific; this arrangement continued in the east even after Johns-Manville became a producer (Tr. 4652–4655, 4895–4898).

[9] Membership included the following persons, identified by their companies:

*USG:* Respondent Andrew Watt (a director and executive of the Association from 1963 to 1974) (IV A. 2248); Graham J. Morgan (C.A. App. 1723ex–1724ex, 1740ex, 1758ex); Robert Gimlin, vice president of merchandising (I A. 313, 332–333).

*National:* Respondent Colon Brown (C.A. App. 1736ex, 1739 ex); John W. Brown, the senior vice-president for sales (C.A. App. 344a–345a, 23ex); J. W. Duncan, the vice president for industry relations and trade sales (V A. 2621; C.A. App. 1581a, 25ex); John P. Hayes, vice-president for merchandising operations (II A. 1008–1013). Kenneth Atwell, although not one of National's official representatives, attended "quite a few" meetings while holding several positions in sales administration (II A. 590; C.A. App. 1581a).

*G–P:* William H. Hunt (C. A. App. 1739ex); K. A. McCaskill, vice-president of sales (I A. 387–388; C.A. App. 332a); Robert I. Fredericks, president of Bestwall Division, and Arnold L. E. Meyer, director of marketing services (C.A. App. 36ex–37ex; Tr. 5143–5144). Malcolm Meyer, executive vice-president of Bestwall, was its representative to the Association until G–P acquired Bestwall (IV A. 2247; C.A. App. 918a–920a).

*Celotex:* William D. Herbert (C.A. App. 1745ex, 1758ex–1766 ex); Marvin Greenwood, senior vice-president of marketing (C.A. App. 41ex, 1719ex–1756ex); Donald W. Miller, merchandising manager (C.A. App. 44ex, 1719ex–1766ex); Warren E. Hill, Jr., promotional manager and assistant merchandise manager (C.A. App. 42ex, 1727ex–1741ex). Hill returned to the Association's meetings in 1967 and 1968 as a representative of Texas Gypsum Co. (C.A. App. 1745ex–1754ex).

*Kaiser:* Claude E. Harper, president (C.A. App. 1719ex–1724 ex, 1729ex, 1736ex); Robert A. Costa, vice-president and general manager (C.A. App. 1720ex, 1733ex, 1739ex, 1745ex, 1754ex, 1758 ex–1764ex); J. J. Hague, vice-president for sales (C.A. App. 1719ex–1758ex).

*Flintkote:* George J. Pecaro (C.A. App. 1720ex, 1736ex, 1739ex, 1754ex, 1758ex); James D. Moran (C.A. App. 1725ex–1727ex, 1730ex–1759ex); W. S. Malhiot (C.A. App. 1726ex, 1729ex–1739ex); W. L. Seitz (C.A. App. 1719ex–1739ex).



The Association provided a forum for discussion of industry problems, both at formal meetings and at informal gatherings (C.A. App. 325a–330a, 922a). At formal meetings members discussed topics including: (1) eliminating the provision of pallets and other handling aids in making deliveries,[10] and (2) the need to maintain industry price levels and profits (C.A. App. 1393ex). Association members were aware that they had "stepped in the gray areas of

[10] See C.A. App. 1567ex–1571ex (draft minutes of one Association committee meeting) and V A. 2563–2566; C.A. App. 1545ex, 1557ex–1558ex, 1572ex–1575ex, 1589ex (corporate correspondence).

legal restrictions" on the matter (C.A. App. 1607ex), and the Association's attorney deleted references to such discussions from the Association's official minutes (C.A. App. 505a–507a, 1576ex–1578ex).[11]

During informal gatherings at Association meetings, members exchanged information on prices (I A. 200, 332–333; II A. 537; C.A. App. 1389a, 1391a) and credit terms (II A. 821). Members also indoctrinated new members and officers in industry price exchange practices (I A. 195–197), and uniform delivery practices (I A. 201–205).

### 3. THE PRICE INFORMATION EXCHANGE AGREEMENT

Respondents had a practice—which they called "verification"—of exchanging and discussing information relating to prices, terms and conditions of sale, methods of delivery, and any other matter affecting market stability. Respondent Watt acknowledged that this practice existed as early as 1953 (III A. 1453–1454), and other witnesses described it as ongoing in 1960 (I A. 165; III A. 1284). Numerous witnesses expressly acknowledged that the producers had an agreement, or at least an understanding, to exchange information (I A. 230, 314, 422); other witnesses admitted to facts showing the existence of an agreement (I A. 159, 216, 513; II A. 785, 1005, 1105; Tr.

[11] Members considered such editing particularly important after the Association was sued in *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal.), a private antitrust action. See C.A. App. 1598ex, 1602ex.



11, 669). The corporate officials who carried out the exchanges included many of the group who regularly attended Gypsum Association meetings;[12] they concealed the exchanges from customers and field sales personnel (I A. 332–333; III A. 1300; C.A. App. 1422a).

The discussions of competitive matters covered entire classes of customers in broad market areas (see, *e.g.*, I A. 345–347; II A. 544–545; IV A. 2316, 2400–2401). Respondents freely volunteered among themselves all available information concerning the transactions at issue and their activities in other markets (see, *e.g.*, C.A. App. 1455a–1456a, 150ex, 363ex–364ex; Tr. 3651), and they communicated to one another their intentions concerning prices and other matters affecting market stability (see, *e.g.*, IV A. 2303, 2308, 2363).[13]

[12] These overlapping persons included: respondent Watt and Gimlin of USG (I A. 314, 330; II A. 534; III A. 1421, 1464); John Brown, Duncan, and Atwell of National (II A. 535, 591; III A. 1467); McCaskill, "Al" Meyer and Malcolm Meyer of G–P (I A. 320, 395; III A. 1467); Greenwood, Miller and Hill of Celotex (I A. 320; II A. 535; III A. 1467); Costa and Hague of Kaiser (I A. 320–321; II A. 536; III A. 1467); Moran, Malhiot and Seitz of Flintkote (I A. 321; II A. 536; III A. 1467).

[13] During the trial respondents contended that their price discussions were narrowly confined to specific customers and to mere "yes or no" answers to specific inquiries about whether a particular price or other term of sale existed or was being offered to a particular customer (see, *e.g.*, I A. 150–151; II A. 572, 592; III A. 1278, 1422–1423; Tr. 280–281). They did not repeat this contention on appeal.

In 1962 Graham Morgan, chairman of the board of United States Gypsum (USG), authorized in writing a select group of pricing officials to participate in the discussion and exchange of prices and terms and conditions of sale with USG's competitors (II A. 987–988; V A. 2654).[14] He allowed inquiry into the entire "competitive situation in a market" (V A. 2654). Morgan recognized that such exchanges would have to be reciprocal (*ibid.*):

> It is often advisable to answer such inquiries [from competitors], because otherwise the competitor may be misinformed as to our prices and policies and answering the inquiry may avoid consequences unfavorable to the Company.

The "unfavorable" consequences that the defendants sought to avoid were lower prices and nonadherence to published terms and conditions of sale (I A. 159–160, 339–340, 501; II A. 588–589, 659–660). Deviations often were reported on forms used by the defendants' field sales forces to request authority to meet competition (I A. 150). If a "deviation"—whether or not it actually existed—led to lower prices or better conditions of sale by any major competitor, the "deviation" would spread (I A. 247–248, 340–341; II A. 588–589, 659; IV A. 2251; V A. 2410).

To guard against this, the defendants checked "significant" deviations with one another. They concentrated on, for example, the first changes reported

[14] Morgan pleaded *nolo contendere* to the charge in the indictment. See note 3, *supra*.



in a market (see, *e.g.*, II A. 694, 909–910, 1104–1105); those allegedly granted to large customers (see, *e.g.*, I A. 232), and those involving "excessive situations" affecting market stability (see, *e.g.*, IIA. 542, 552; IV A. 2298–2299). The more competitive activity there was in a market, the more the defendants exchanged information in an attempt to abate that competition (see, *e.g.*, I A. 213, 331, 627; C.A. App. 1722a).

Each present or former official of the corporate defendants who testified stated that the information was exchanged in anticipation of the need to establish the "meeting competition" defense to a charge of price discrimination (see, *e.g.*, I A. 363–364, 511; II A. 628–629; III A. 1292, 1420–1421). But both USG and G-P had received legal advice in the early 1960s that such exchanges were not lawful.[15] Moreover, officials of all of the corporations acknowledged [redacted], that the exchange served business purposes beyond that one.[16] For example, A. L. Meyer of Georgia-Pacific (G-P), who spent 27 years in the gypsum industry

[15] I A. 314–316; IV A. 2277 (USG). III A. 1134, 1185–1190; V A. 2599–2600, 2602, 2604–2605 (G-P).

[16] See, *e.g.*, I A. 159–160, 187 (Bear of USG); I A. 205 (Simpson of Republic); I A. 287–288 (M. Meyer of Bestwall); I A. 339–340, 375–376 (Gimlin of USG); I A. 443–444 (McCaskill of G-P); I A. 511–514 (Burch of G-P); II A. 545 (A. L. Meyer of G-P); II A. 572, 583, 587–589 (Sikes of G-P); II A. 615, 658–660 (Atwell of National); II A. 668 (Kroth of National); II A. 694 (Webster of National); II A. 753–754 (Van Cleave of Texas Gypsum); II A. 785 (Downing of Kaiser); II A. 820–821 (Kellogg of Celotex); II A. 833–834 (Jarrett of Celotex); II A. 907, 909–910 (Baldwin of USG); II A. 960 (Galvin of USG); II A. 1004–1005 (Kent of National); III A. 1464–1466 (respondent Watt).

(I A. 531) and who actively participated in discussions with his competitors until June 1969, when he retired (II A. 533–534), testified that the real purpose of the agreement to exchange information was "to keep market stability" (II A. 545).

Robert Gimlin, vice president of USG, testified that USG exchanged information "[s]o we wouldn't be over-competitive on price" (I A. 339–340) and agreed that the agreement to exchange information stabilized prices (I A. 378). Gimlin also confirmed that the agreement helped the company's profit picture (I A. 375–376) and that prices would have declined more quickly without the price information exchange program (I A. 377). Defendant Watt's predecessor, Henry Bear, also admitted (I A. 159–160) that the reasons for exchanging information "were entirely selfish * * *. I felt it was to our advantage to confirm [any] price rather than let the competitor guess at what price we might have been selling and thereby possibly undercutting the price." He continued (*ibid.*): "the obvious purpose there was to avoid us chasing ourselves [offering a lower price] in the case that the competitor undercut us."

A vice-president of National also conceded that "price checking" prevented price decreases by helping National to avoid initiating competition in markets where competitors were abiding by their published prices (II A. 658–660).[17] Similarly Robert

[17] For other testimony to the same effect, see II A. 753–754 (Van Cleave, general sales manager of Texas Gypsum); II A. 960 (Galvin, director of merchandising of USG); II A. 833–834 (Jarrett, general credit manager of Celotex).



Sikes, the pricing administrator of G–P, testified that he discussed price with competitors to save money for the company and to stop prices from going down (II A. 588–589).

None of the corporations or employees involved in exchanging information maintained systematic records of the communications. Indeed, some of the companies instructed their employees or agents not to keep records and to destroy existing records.[18] The prosecutor argued that this was odd, because the exchange allegedly was conducted to permit a defense to any charge of price discrimination and such records might have been useful in a price discrimination case.

The exchange of price information continued during 1966 and 1967 (II A. 575–576, 614–615, 668–669, 953–954; IV A. 2252, 2348), years when all major producers adhered to strict no-discount policies (II A.

[18] See, *e.g.*, III A. 1459–1460 (USG); II A. 656–657 (National); I A. 393 (G–P); III A. 1272 (Celotex). G–P maintained no records despite a suggestion by its counsel that it do so (IV A. 2253).

Kaiser instructed its employees to destroy any existing notes of competitive contacts and not to keep any more, in anticipation of possible "complications" (II A. 782–784; C.A. App. 1402 ex). In 1966 USG instructed Arthur Andersen & Co. to stop keeping records of calls for its job protection register (see pages 26–28 and note 31, *infra*) and suggested that prior records be disposed of (IV A. 2245–2247). In 1968 National's vice president for sales administration instructed its division managers to keep themselves "legally clean" by not keeping notes of competitive contracts; he gave this advice shortly after he and another National official had been deposed in a private antitrust suit, *Wall Products Co.* v. *National Gypsum Co.*, *supra* (II A. 592–598; IV A. 2282–2283).

622; III A. 1387–1389, 1444). The defendants did not argue that their apprehension concerning price discrimination suits justified exchanging information during those years, and even some company officials were unable to explain the reasons for the exchange in 1966 and 1967 (II A. 937; III A. 1408).[19] See also pages 37–40, *infra*.

#### 4. THE SINGLE PLANT PRODUCERS

During the early 1960s new companies began to make gypsum board (IV A. 2249; Tr. 1416–1417). The Gypsum Association recruited them as members (C.A. App. 618a, 925a, 961a) and attempted to induce them to adopt established industry practices.

American Gypsum Co. opened a single plant in 1960 and joined the Gypsum Association (C.A. App. 1720ex, 1769ex). Its vice president for sales visited USG's headquarters; he obtained USG's prices and terms, which American adopted (I A. 173–175; C.A. App. 955a, 958a). American took part in the exchange of information with the defendants (II A. 537; C.A. App. 960a).

Texas Gypsum Co. opened a single plant in El Paso, Texas, in the Fall of 1960. It announced a policy of delivering gypsum board to warehouses and

[19] Moreover, Gimlin of USG testified that his subordinates' "verification" authority covered both the prices of new products (even though not yet marketed) (I A. 322, 327) and reports that competitors were changing their prices, to ascertain the new prices and to learn the areas where they were to become effective (I A. 328).



jobsites by truck (C.A. App. 934a–936a). The practice was new in that area (I A. 202; C.A. App. 1837a).[20] The president and the vice-president of American Gypsum separately visited Claude Huckleberry, Texas Gypsum's founder; they urged him to join the Gypsum Association and warned him of reprisals by the major producers if he delivered board by truck (C.A. App. 949a–960a). They told Huckleberry that membership would enable him "to change a price or a policy" by telephoning pricing officials of the defendants (C.A. App. 958a–960a).

Malcolm Meyer, an official of Bestwall and of the Gypsum Association, also repeatedly urged Huckleberry to join the Association in order to "normalize the business, [so that] we would all make more money" (C.A. App. 993a–997a). Meyer tried to dissuade Huckleberry from delivering gypsum board by truck and admonished him that they could "iron out" their problems (C.A. App. 993a) and "get the numbers [prices] up" (C.A. App. 961a–962a) by making best use of the Gypsum Association.

When Huckleberry refused to join the Gypsum Association or to adopt the established industry prac-

[20] The major producers considered Texas a "rail delivery" area, with prices based on carload quantities (C.A. App. 571a–573a). Deliveries by truck, particularly to jobsites and in smaller quantities, produced substantial savings for buyers (C.A. App. 606a–610a). Texas Gypsum's practices thus amounted to a lower effective price and represented a significant competitive challenge to the major producers (C.A. App. 574a–575a).

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tices, the defendants retaliated with a series of predatory practices.[21] Texas Gypsum lost money and

[21] While Texas Gypsum was in the process of starting production, USG secured confidential information about the company from its banker (C.A. App. 1007a–1012a, 1404ex–1412ex).

Huckleberry hired William A. Kincaid, an experienced engineer from USG, as general manager (C.A. App. 1071a, 1948ex). When Huckleberry took a two-day trip, Kincaid "ran off" some of his employees and produced "reject board" for the entire period; when a ceremonial opening of the plant was held, the motors, which had been wired by Kincaid, ran backwards (C.A. App. 1072a–1075a). Huckleberry fired Kincaid, and USG rehired him the next day; he remained at USG at least through 1973 (C.A. App. 1075a–1076a, 1948ex).

As soon as Texas Gypsum began regular operations, USG, National, Kaiser and Flintkote opened warehouses and began trucking board to dealer locations and job sites in El Paso (C.A. App. 571a–577a, 937–942a, 1968ex, 1858ex–1870ex). They placed unusually heavy stock in the market at large discounts (C.A. App. 942a, 1002a–1003a, 1689ex), reduced list prices by more than 13 percent when Texas Gypsum began to run a second shift (C.A. App. 1017a–1019a), and offered special allowances that Texas Gypsum did not give (C.A. App. 1020a–1021a). At one point, USG offered to "normalize the market" if Huckleberry would stop deliveries to job sites (C.A. App. 1001a), and he agreed because of the losses he was sustaining; before the effective date of the agreement, however, USG shipped in a three or four month supply of discounted stock (C.A. App. 998a–1003a, 1871ex–1872ex).

Texas Gypsum made its first sale in the Dallas market, to Groves Lumber Company, in December 1961 (C.A. App. 888a–889a, 936a). John Tinsley, the manager of Groves, was visited by a National salesman, who asked for a sample of the Texas Gypsum product (C.A. App. 893a–894a), and then by respondent Nicely in March 1962 (I A. 281). Tinsley asked Nicely why Texas Gypsum was "given such a bad time" in every market that it entered. Nicely replied that "there was a policy of containment aimed, directed at Texas Gypsum Company" and that "[t]hey knew what the cost was of Texas Gypsum Company, their manufacturing costs, and they knew what they had to get it down



Huckleberry ultimately was forced to sell his interest in January 1965 (C.A. App. 1037a–1040a). The new management joined the Gypsum Association (C.A. App. 1040a–1041a, 1837a–1838a, 1730ex–1731ex). Although Texas Gypsum continued delivering by truck (C.A. App. 1837a), the company published list prices identical to those of the major producers (II A. 746–747), and the new president, formerly an official of Celotex and Flintkote (C.A. App. 1829a), began exchanging price information with major producers, at least in part to avoid lowering market prices (II A. 754).

In 1964 another new single-plant firm, Republic Gypsum Co., began production at Duke, Oklahoma (C.A. App. 615a–616a). Just before it opened, the Gypsum Association invited the owners to join, and they did so in October of 1964 (C.A. App. 618a–619a, 1739ex–1740ex). Respondent Watt took Republic's representative aside at his first Association meeting and told him that "certain things * * * went on in the gypsum industry," including "the exchange of price information and the need to be honest" (I A. 195). Shortly after the Association meeting, Republic's president received a call from

to where they could keep him out of the market" (C.A. App. 898a). Texas Gypsum ceased doing business in El Paso in September 1962, and the major producers then closed their warehouses and returned to their former list prices and rail-only delivery terms in that area (C.A. App. 1021a–1022a, 1398ex).

Texas Gypsum entered the Dallas, Fort Worth market in the Fall of 1962, and again the major producers began cutting prices and offering special allowances in markets in which Texas Gypsum sold (C.A. App. 1025a–1028a).

John Brown of National, who wanted to know what prices Republic was offering to a particular customer (I A. 196–197). He provided the requested information (*ibid.*).

Republic's president testified that he participated in the "agreement" (I A. 230) to "prevent the price from sliding down" in his market, where prices were "much lower * * * than in other places in the United States" (I A. 205).[22] Notwithstanding his concern "about the legality of these discussions" with competitors, he continued to engage in them (I A. 206).

### 5. SUBSIDIARY AGREEMENTS

Defendants' exchange of price and other information facilitated concerted increases in list prices and control of the terms of sale. These effects were most pronounced in 1965 and 1966, when the industry was plagued by overcapacity and declining demand, market conditions that would have required price reductions in the absence of concerted activity.[23]

[22] The major producers responded to Republic's initiation of truck delivery in various markets by reducing prices and offering special allowances (I A. 202–203). One representative of a major producer at an Association meeting told Republic's representative that one State "[was] not a trucking market" (I A. 203), and another said that "he did not like the fact that we were trucking in West Texas" (I A. 205).

[23] After at least four years of expansion, industry sales fell from $354.7 million in 1964, to $323.6 million in 1965, and to $312.4 million in 1966. They recovered slightly in 1967 to $322.3 million (IV A. 2249). The decline in sales followed a substantial increase in industry capacity between 1960 and 1965, caused by expansion of existing firms and the entry of new ones (I A. 389–390; IV A. 2256, 2260; C.A. App. 389ex–390ex).



*a. The agreement to increase and fix the price of firerated board*

G–P entered the gypsum industry in April 1965 by purchasing Bestwall Gypsum Co., the third largest producer (IV A. 2241, 2249). The other producers were uncertain whether G–P, with its own warehouse system, would change Bestwall's pricing and distribution policy and disrupt market stability (I A. 347–348; IV A. 2256). They discussed this concern with G–P and Bestwall officials during meetings and telephone conversations throughout 1965, and they received assurances that Bestwall's personnel and pricing policies would not be changed (I A. 348–349, 498–499; C.A. App. 1264a; Gov't Exh. 445 (April 23, 1965)).

On July 1, 1965, only two months after the merger, G–P announced a nationwide price increase on ½" and 5/8" firerated board, which represented a substantial part of its sales (C.A. App. 322ex). On August 11, 1965, following a meeting between defendants Watt of USG and Hunt of G–P (C.A. App. 1676ex), USG announced an identical price increase effective September 1 (C.A. App. 323ex, 373ex). Within ten days the remaining corporate defendants followed suit (C.A. App. 326ex–328ex, 331ex; Gov't Exhs. 3063, 3549, 3550).

USG and the other companies indicated that they would not provide "price protection" for future

sales.[24] One day after a visit by National's John Brown (C.A. App. 1388a, 1663ex), G–P followed suit by instructing its regional managers not to extend price protection (C.A. App. 325ex); G–P required the managers to acknowledge personally their receipt of the instruction (C.A. App. 332ex–345ex).[25]

Widespread price protection could have threatened the success of the price increase (I A. 329; II A. 609; C.A. App. 742ex–744ex). But refusal to grant price protection to meet competition would have caused substantial loss of volume (C.A. App. 360ex). The success of the venture thus turned on concerted cessation of competition in this regard. Receiving reports of protection allegedly granted by the others (C.A. App. 324ex, 358ex, 360ex, 368ex–370ex), the producers used the established price information exchange program to

[24] "Price protection" is an assurance by a producer that it would make future deliveries of board at a certain price for use on a specific job, regardless of intervening price increases. The practice protects a dealer or contractor that has made a fixed-price bid to construct a large job that would require future delivery (I A. 366–368; C.A. App. 1253a). Price protection is, in effect, an option for the buyer, who does not commit himself to buy from the protecting manufacturers (III A. 1485). Protection was most important in relation to firerated board, which was used for high-rise apartments and commercial structures (C.A. App. 1217a–1219a).

[25] Kenneth A. McCaskill, who issued the "no protection" order, was a participant in the meeting with Brown (C.A. App. 1388a, 1662ex). The day after the meeting, Brown's subordinate at National also raised the subject of price protection, noting that his "checking" had revealed no one else was granting it. Brown responded: "we will not protect" (C.A. App. 324ex).



seek and to give direct assurances that they were not granting protection to anyone (IV A. 2400; C.A. App. 1246a–1248a, 1253a–1256a, 361ex–362ex). At the beginning of October 1965, G–P's pricing administrator was able to report that (C.A. App. 372ex):

> A determined effort was made by many dealers on the West Coast to break the price increase on ½" and 5/8" FIRESTOP; however from all indications this was resisted by all suppliers and the price increase on FIRESTOP remained firm throughout the country.

*b. The agreement to eliminate applicator discounts*

Applicator allowances[26] became a competitive problem in Oregon and Washington in the Summer of 1965 (C.A. App. 375ex). On September 29, 1965, A. L. Meyer, senior assistant to Kenneth A. McCaskill, G–P's vice president of sales, discussed the competitive situation on the West Coast with Robert Gimlin, USG's vice president of merchandising, Jim Hague, Kaiser's sales vice president, and O. C. White, general manager of Fibreboard's gypsum division (C.A. App. 498ex). Three days later, on Saturday, October 2, Gimlin telephoned McCaskill to obtain his "reaction to ways and means of eliminating applicator allowances in the Portland (Ore.) Market," and he proposed a cessation of the discounting policy (V A. 2404). McCaskill

[26] "Applicator allowances" were price discounts to large contractors (applicators), which purchased the defendants' products through dealers and not directly (I A. 415; IV A. 2259; C.A. App. 1102a–1104a).

responded to Gimlin's inquiry by immediately ordering that G–P stop giving allowances; on October 4 he instructed a subordinate to tell "J. Hague" that G–P was "today notifying our trade (applicators) that this is withdrawn effective 12/31/65" (I A. 416–419; II A. 579–580; V A. 2404).

G–P advanced the date of cessation to November 1 after Hague complained to McCaskill that an applicator customer of Kaiser's had switched to G–P because G–P offered an applicator allowance (I A. 418–419; V A. 2405–2407). All of the defendants eliminated applicator allowances effective November 1 in Washington and Oregon (I A. 419; C.A. App. 383ex). McCaskill described the communications with G–P's competitors that led to cessation of applicator allowances as a "very vivid example of verification" (I A. 404–406; II A. 580), which "was a part of the decisionmaking process, I am sure, that caused the cancellation of this commitment" (I A. 419).

*c. Miscellaneous price agreements*

Other episodes illustrate the use of price information "verification" to agree on prices. In September 1964 USG learned that National was about to begin selling water-resistant board (C.A. App. 304ex). O'Brien of USG called Atwell of National to ascertain whether National would adopt USG's prices for that type of board. Based on the call to Atwell, O'Brien noted that (IV A. 2398):

> National either has or will shortly have a product similar to our WR. Their FOB mill base [price] will be competitive to ours. Their manufacturing and shipping points will match ours. Equalized freight will be added to the mill price. The equalized freight to be calculated from either the National or competitive mill making the rate.



In 1967 neither USG nor G–P had a published price for a non-standard size of vinyl covered wallboard; quotes were made to customers based on internal unpublished formulas for such board (II A. 969; V A. 2645). In January 1967 Galvin of USG approved a request to meet a G–P price for vinyl wallboard quoted to a mutual customer. Although he had already approved the lower price, Galvin nevertheless called Sikes and learned that G–P's lower price was based on a formula. Galvin reported this in a handwritten note to F. W. Weiser (II A. 968–969; A. 2646). Galvin later learned from Sikes G–P's formula for this odd size of vinyl wallboard, and he "corrected" the USG formula to conform to G–P's (II A. 969–970; V A. 2645).

*d. The agreement to increase list prices and to eliminate discounts*

Despite elimination of some discounts, overall gypsum board price levels continued to decrease throughout 1965 (IV A. 2256). USG's management concluded that the price erosion was caused by competition from the single-plant producers (V A. 2410; C.A. App. 389ex–390ex) and projected a further downward trend in prices (C.A. App. 389ex–390ex).

Watt, Graham Morgan and Gimlin devised a plan to eliminate discounts and raise prices by simply ignoring the competition from the single-plant producers, conceding to them all the sales they could make, given their limited production capacity (V A. 2410 ¶ 4, 2424–2425). The major producers would lose sales,[27] but they could charge a sufficiently higher price for the remaining volume; because demand was inelastic, the profits of all producers would increase if all of the major producers followed suit (I A. 351–352; V A. 2425–2427).[28]

The planners believed, however, that "[t]here is an inherent risk that we could lose both position and price improvement" (V A. 2426), and they calculated that the loss of gross profit might exceed $18 million (*ibid.;* C.A. App. 1160a–1162a). Because of the potential hazards of the strategy, defendants Watt and Graham Morgan took the unprecedented step of seeking prior approval from USG's executive committee and ratification from the board of directors (V A. 2433–2440; C.A. App. 3228a–3229a).

On November 17, 1965, USG announced a price increase and a new policy of selling at list price only, effective December 15, 1965 (C.A. App. 467ex–470ex). USG deposited with the accounting firm of Arthur Andersen & Co. a list of price protection commit-

[27] USG anticipated that its share of the national market would decrease from 37.5 percent to 30 percent (V A. 2426).

[28] This strategy has proven successful for other monopolies and cartels. See Posner, *Antitrust Law: An Economic Perspective* 29, 58, 68 (1976); Stigler, *The Dominant Firm and the Inverted Umbrella*, 8 J. Law & Econ. 167 (1965).



ments made prior to November 17 and privately notified its competitors both that the list was available to them and that USG would not make future commitments (C.A. App. 1147a, 645ex–646ex, 652ex–655ex, 660ex–663ex, 667ex–668ex). USG's job protection list was "a stipulation [to competitors] that we were not going to honor any job protection beyond what we posted in this list with Arthur Andersen" (C.A. App. 1144a). In another change not publicly announced, USG placed in defendant Graham Morgan, USG's chief executive officer, all authority to deviate from the new prices (C.A. App. 1153a–1155a, 459ex).

Between November 17 and December 2, 1965, each of the other corporate defendants published identical price increases; all of the producers stating that there would be no discounts from published prices (C.A. App. 559ex–566ex). All of the other producers also adopted, but did not announce to the public, the three unannounced features of USG's plan: (1) not meeting single-plant competition,[29] (2) limiting to one person all authority over price,[30] and (3) strictly

[29] See V A. 2475, 2477; C.A. App. 813ex, 816ex, 820ex–827ex (National); C.A. App. 831ex–832ex, 834ex, 836ex, 839ex–847ex, 873ex, 1321ex–1322ex (G-P); C.A. App. 848ex–859ex (Celotex).

[30] Respondent Brown personally decided to centralize pricing authority for National (C.A. App. 3591a–3592a). At Celotex, a new department was created on November 23, 1965 "to centralize responsibility for competitive pricing decisions" (C.A. App. 880ex); one week later Celotex announced its no-discount policy (C.A. App. 561ex). Georgia-Pacific's authority already reposed in McCaskill and his immediate subordinate (C.A. App. 1276a–1277a; Tr. 4229), but the company sent emphatic instructions to its field personnel that they had "no authority" to give discounts (C.A. App. 481ex–483ex).

controlling price protection through the creation of job price protection lists."[31]

Numerous formal and informal meetings and discussions between top officials of USG and the pricing officials of the other producers preceded the new strategy."[32] On November 10, 1965, immediately after the USG board of directors approved the price in-

[31] All of the other defendants accepted the invitation implicit in USG's letter by assembling and maintaining lists or files of jobs for which they had granted price protection. See C.A. App. 1565a–1566a, 692ex–696ex (National); 1506a–1508a, 698ex (Georgia-Pacific and Johns-Manville); 721ex, 730ex–731 ex, 737ex, 740ex–741ex (Celotex); 733ex–734ex (Kaiser); 735 ex–736ex (Flintkote). Unlike USG, they did not file the information on these lists with a third party. Instead, they simply exchanged information. For example, Kenneth Atwell of National confirmed price protection on a job, and specific prices, for G–P in July 1966 (II A. 552, 579; C.A. App. 799ex–800 ex). See also V A. 2454–2455; C.A. App. 788ex.

[32] Defendant Graham Morgan, USG's president, and respondent Brown, National's chairman, met and spoke by telephone several times during 1965 to discuss patent litigation and "other subjects of mutual interest" (C.A. App. 3467a–3468a, 3503a, 3489a, 643ex). Defendant Hunt and Robert Fredericks, president of G–P's Bestwall Gypsum Division, met during 1965 with their counterparts at USG and National, and Fredericks admitted that these conversations included discussion of pricing "philosophy" (C.A. App. 1264a, 1387a–1388a, 1390a–1394a, 404ex–405ex, 531ex, 1641ex, 1663ex, 1672ex, 1676ex; Tr. 5163–5164; Gov't Exhs. 532A, 534A, 532B). Expense reports show that Gimlin of USG met with Hague and Costa of Kaiser on October 12 and with Moran and MacDonald of Flintkote on October 15 (C.A. App. 543ex). Respondent Watt met with Seitz of Flintkote and Hague of Kaiser on October 13 (C.A. App. 545 ex). John Brown of National met with Moran and Carpenter of Flintkote on October 12, and with Walter, Collins and Miller of Celotex on October 13 (C.A. App. 546ex, 549ex–550ex).



crease, respondent Watt went directly to New York, where Flintkote had its headquarters (III A. 1500; C.A. App. 570ex),[33] and the following day to Tampa where he met James Walter, who was in charge of Celotex's parent corporation (*ibid.*). On November 14, 1965, defendant Morgan flew from Chicago to Portland, Oregon, for a Sunday meeting with defendant Hunt and R. B. Pamplin of G–P (C.A. App. 534ex–535ex, 567ex).[34] On or about November 17, he also talked with respondent Brown of National, who had gone to Chicago on the 15th, the date of Morgan's return from Portland (C.A. App. 3589a).

Respondents Brown and Nicely, both of National, testified that they independently decided to follow USG's lead within hours of its public announcement (III A. 1558–1559, 1563; C.A. App. 3591a). An internal "Plan of Action" at National (C.A. App. 594ex–596ex), and its draft announcement letters (C.A. App. 597ex–603ex), establish that National knew of USG's price decision before its public announcement, and that National had planned to adopt the

[33] Respondent Watt denied meeting with Flintkote officials on that trip; he conceded speaking with defendant Moran, Flintkote's president, but testified that the communication took place by telephone in early December (III A. 1500–1501; V A. 2480).

[34] Morgan's expense voucher does not reveal a meeting with Pamplin or Hunt (C.A. App. 567ex). But Pamplin's and Hunt's pocket calendars show Morgan's expected arrival time and flight number on Sunday morning (C.A. App. 534ex–535ex). Only after these calendar entries were uncovered by the grand jury did Morgan admit that the meeting took place (C.A. App. 204a–211a).

same policy.[35] These contemporaneous documents and the concerted price moves formed the basis of the decision in *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295, 321–323 (N.D. Cal.), that a conspiracy to fix prices had been demonstrated. Contemporaneous documents also establish that G–P and Celotex had advance knowledge of USG's decision.[36]

The single-plant producers prospered under this scheme, and their threatened expansion jeopardized

[35] See C.A. App. 442ex, 451ex, 459ex, 461ex. Witnesses for National explained that they learned of USG's plans only when one of their field employees in Chicago secured a copy of USG's announcement along with a copy of an internal USG memorandum to its sales force on the morning of November 17, dictated their contents to National's headquarters by telephone, and then mailed them (II A. 618, 1035–1037; III A. 1559; C.A. App. 3590a, 609ex–613ex). The announcement, however, was not mailed by USG until November 17 (C.A. App. 557ex), and according to the postmark the National employee did not mail his copy to headquarters until the afternoon of November 18 (II A. 1039–1040; C.A. App. 613ex).

[36] A. L. Meyer's desk calendar shows that G-P began planning for a change in price policy on October 20, shortly after the Gypsum Association meeting (C.A. App. 507ex), and proceeded with pricing recommendations (C.A. App. 508ex), meetings on prices (C.A. App. 511ex) and draft correspondence (C.A. App. 516ex, 520ex) from then until November 15. Meyer's calendar shows no such activity between November 17, when USG made its public announcement, and November 24, when G-P announced its new prices (Gov't Exh. 445).

On November 17, 1965, the same day USG mailed its price increase announcement, and two days before Watt sent his letters to competitors advising them of the USG price protection list, Celotex district managers were ordered by headquarters to send in details of any price protection commitments (C.A. App. 721 ex). This order was prepared "at the request of management" pursuant to an "outline of program re price change in December" (C.A. App. 730ex).



the success of the major producers. In 1968 the defendants resumed giving selective discounts in order to meet the competition from single-plant producers (see pages 46–47, *infra*). They continued, however, to adhere to agreed-on list prices in the absence of such competition (*ibid.*).

*e. The agreement on credit terms*

On January 25, 1966, a month after the uniform no-discount policy went into effect, USG announced a new set of credit terms, including the termination of all long-term credit, effective March 1, 1966 (C.A. App. 1044ex–1046ex).[37] National did the same on February 1, Georgia-Pacific followed suit on February 7, and all of the major competitors

[37] Standard credit terms for USG and National prior to January 1966 had allowed a two percent discount if payment were made by the tenth day of the month following delivery ("2% 10th prox"), with any remainder due by the end of that month ("net end of month") (V A. 2740; C.A. App. 922ex). "Extended" terms, granted as a competitive device, meant that the purchaser would have additional time, such as an extra 30 or 60 days, to qualify for the discount and for payment of any balance due (I A. 215–216; II A. 778–779). Although the March 1, 1966 terms were more liberal on their face (2% 20th prox, net 2d 10th prox (C.A. App. 1036ex–1046ex)) than the old standard terms, extended terms had been so widespread that their termination made the new policy much stricter in practice (II A. 778–779; C.A. App. 1291a, 1390a, 1880a–1881a, 894ex, 955ex–956ex, 970ex–972ex). Kaiser's terms were slightly different from the identical terms of the other producers (C.A. App. 971ex, 1041ex), but not enough to make a competitive difference (C.A. App. 1067ex; Tr. 5189–5190).

announced identical terms by February 16 (C.A. App. 942ex, 965ex–967ex, 1036ex–1043ex).[38] As the defendants had done in adopting identical unpublished pricing policies, they all adopted an identical unpublished plan for phasing out the large outstanding balances owed by dealers who had been operating under extended terms (C.A. App. 966ex–967ex, 1048ex ¶ 3, 1051ex, 1993a–1995a; Tr. 7438). Extensive discussions preceded this concerted action.

The defendants recognized by 1965 that the extension of long-term credit had become a competitive "problem" because it offered the major producers a way to compete without altering their list prices (C.A. App. 1880a–1881a, 1291a, 1390a, 894ex, 921ex, 955ex–957ex). The extension of long-term credit at favorable rates was the equivalent of a decrease in price. The major producers did not set new credit terms at the same time as they increased prices, however, because they feared that the combination would have too great an effect on demand and so jeopardize the profitability of the price increase (V A. 2440; C.A. App. 1158a–1159a). Throughout the Fall and Winter of 1965, however, the defendants considered various courses of action.[39]

[38] The district court in *Wall Products* described this plan as a "reaffirmation, extension and tightening" of the December 15, 1965, price-fixing agreement (326 F. Supp. at 327).

[39] See C.A. App. 1158a–1160a, 614ex–615ex, 625ex–626ex, 628ex–633ex, 945ex–962ex (USG); II A. 761–766; C.A. App. 1881a, 1889a–1890a, 1895a–1897a, Def. Exh. (NG) 44–45 (National); C.A. App. 943ex–944ex (G–P); C.A. App. 963ex–967ex (Celotex); C.A. App. 970ex–974ex (Kaiser); C.A. App. 968ex–969ex (Johns-Mansville).



The senior financial officers of National opposed any modification of the policy of giving discounts for cash payments because, "in view of the competitive situation, * * * the possibility of accomplishing this modification regardless of its merit is not realistic" (C.A. App. 895ex). Respondent Brown nevertheless directed his subordinates to continue the study and to leave the question of competitive acceptance to "top management [respondent Brown (II A. 763)] supported by the Senior Vice President of Sales [John Brown (*ibid.*)] whose function is one primarily directed to industry relationships" (C.A. App. 896ex).

The October 1965 meeting of the Gypsum Association provided a timely opportunity for the defendants to discuss the matter. The Association formed a special "Marketing Task Force" to assist the producers in exploring the "collective treatment" of the various problems that overcapacity and declining demand had created (C.A. App. 1002ex; Gov't Exh. 2442, pp. 3–4). Respondent Watt, who considered "credit and collection attitude" one of the industry's major problems (C.A. App. 1028ex, 1737ex), was appointed head of the task force (V A. 2608). In this capacity, Watt telephoned Fredericks of G–P, Walter of Celotex, and Moran of Flintkote (III A. 1500–1501; V A. 2479–2480), then had the task force expanded to include the entire board of directors of the Association (*i.e.*, representatives of all the com-

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panies (C.A. App. 309a). He called a meeting of the task force for January 27, 1966, the day after USG announced its credit policy change (C.A. App. 976ex, 1002ex, 1046ex).

Internal documents of USG's competitors show that they knew not only that other producers were considering a change of credit terms but also the new terms being considered.

Fredericks of G-P met with respondent Brown of National in Buffalo on December 10, 1965 (C.A. App. 636ex).[40] On December 20, 1965, Fredericks met with respondent Watt and defendant Morgan (both of USG) (C.A. App. 1123ex; Gov't Exh. 532). Fredericks's subordinates also were in touch with their counterparts at USG and National.[41] In mid-January

[40] That same day Brown directed a "CONFIDENTIAL" memo to National's senior financial vice president telling him to "presume that the decision has been made" to change sales terms and to speed preparations (III A. 1584–1585; C.A. App. 915ex).

[41] Robert McDaniel, general credit manager of G-P's Bestwall Gypsum Division, communicated with USG's general credit manager (C.A. App. 1398a; Tr. 5174–5177), who was working on the proposed credit change at USG (C.A. App. 961ex). In addition, A. L. Meyer's desk calendar for January 10, 1966, contains an entry "R.E.M. [R. E. McDaniel] terms/policy" followed by a number "2" circled, Meyer's code for a conversation with National officials (II A. 539; C.A. App. 524ex). Below that entry is another stating: "Bob Evans-US[G]" and a number "1" circled, Meyers code for a conversation with USG (II A. 539). (Evans, who had replaced Gimlin as respondent Watt's chief assistant at USG, had previously been instructed by Gimlin to study the credit terms problem (C.A. App. 960ex)).



Fredericks reported to his superiors (C.A. App. 3196a–1397a, 943ex):

> There is a current study underway within our division (and the industry) to both discontinue extended terms and revise normal terms. Our thinking, broadly, is the maintenance of a 2% 20th proximo net 30 day with the possible addition of 1% penalties for each 30 days overdue. This is still subject to final resolution.

Both USG and National were considering the same formula at the time of Frederick's report (C.A. App. 1889a–1890a, 1895a–1897a, 923ex–940ex, 953ex, 2131 ex).[42]

The cash discount terms the defendants adopted as of March 1, 1966, continued in effect through the date of the indictment (II A. 818; C.A. App. 1425a, 1960a, 2020a–2021a, 2131a–2132a, 2069ex–2070ex; Tr. 7403–7404; Gov't Exh. 3018).[43]

[42] A one percent penalty had never before been employed in the industry (C.A. App. 1398a–1399a, 1903a–1904a, 1924a–1925a, 1998a). None of the defendants subsequently adopted the proposed penalty.

[43] Beginning in 1967 the industry offered a three percent discount, in addition to the regular two percent discount for payment within 30 days, in certain sections of the country as an incentive for even earlier payment (C.A. App. 2029a, 1214ex–1217ex, 1224ex–1227ex, 1231ex–1234ex, 1236ex–1238ex; Gov't Exh. 1348. Sometimes called the "fast five," the extra discount did not otherwise change the standard terms (C.A. App. 1214ex, 1216ex–1217ex, 1224ex–1227ex, 1231ex–1234ex), and it was discontinued by 1970 (C.A. App. 1288ex, 1291ex–1292ex, 1295ex–1297ex, 2069ex–2070ex).

### 6. THE USE OF COMPETITIVE INFORMATION EXCHANGES TO POLICE THE AGREEMENTS

Even after the announcement of no-discount pricing and the new credit terms, the defendants continued to exchange competitive information embracing the full ambit of competitive situations. This information apparently was helpful in assuring the successful implementation of uniform price increases (until federal price controls were imposed in 1971). The major producers promulgated such uniform price changes on at least 11 occasions.[44]

#### *a. Price protection*

From 1966 to 1967 the defendants verified reports of price protection each time they announced a new price

[44] The defendants increased their published list prices on the following dates:
May 1, 1966 (V A. 2545, 2547; C.A. App. 1305ex, 1307ex, 1310ex–1311ex, 1313ex, 1324ex);
February 20, 1967 (in the East) and March 13, 1967 (in the West) (V A. 2548; C.A. App. 1161ex–1173ex, 1315ex, 1328ex);
October 1, 1967 (in the East) and January 15, 1968 (in the West) (C.A. App. 1378ex–1381ex; Gov't Exhs. 2130–2131, 2133–2135, 2138–2143, 2147, 3131);
September 16, 1968 (in the East) (C.A. App. 1240ex, 1242ex–1243ex, 1249ex, 1267ex, 1274ex–1275ex, 1277ex–1279ex, 1281ex–1284ex);
May 1, 1969 (C.A. App. 1178ex–1181ex, 1197ex–1200ex, 1210ex–1212ex; Gov't Exh. 1184);
September 1, 1969 (in the East) (Gov't Exhs. 2181–2186);
January 4, 1971 (NG 476; Gov't Exhs. 2191–2196);
April 1, 1971 (Gov't Exhs. 2201–2206); and
June 14, 1971 (Gov't Exhs. 2211–2216).



increase.[45] They did so even when no producer intended to match another producer's "protected" price. A G-P executive once explicitly stated, in asking a subordinate to check a report: "I do not want to meet this—only [want] to know if this is so" (V A. 2453). The defendants also used the occasion of checking price protection reports to provide assurances that they would adhere to price increases (V A. 2458), to indicate that a third competitor, not directly involved in a particular exchange, was "disturbed" at a report of price protection,[46] and otherwise to state their general policies on price protection (V A. 2741).

As of September 1966 G–P had found no price protection for any buyer against the May 1966 price increase (V A. 2547). By February 1967 USG's register showed only two protected jobs in the entire country (C.A. App. 1938ex–1942ex), and the February and March 1967 price increases thus "proceeded according to plan without any complications" (V A. 2548).

#### *b. Prices*

The defendants continued to exchange price information even during 1966, 1967, and part of 1968,

[45] V A. 2453, 2454, 2456–2458; C.A. App. 764ex–771ex, 777ex–779ex (December 1965 increase); V A. 2459–2473 (May 1, 1966, price increase); V A. 2470–2474 (February and March 1967 increases).

[46] In July 1966 G–P asked Flintkote about a report of price protection and received the reply: "B–D [Flintkote's Blue Diamond Division] backed off/J–M [Johns-Manville] took #1 [writer's code for USG, II A. 539] disturbed/NO J–M price protex" (V A. 2469).

when they were following an agreed-on policy of selling only at list prices (II A. 622, 891, 894, 1043; III A. 1387). While that policy was in effect, it was both unnecessary and impossible to exchange prices for the purpose of avoiding allegations of price discrimination. Defendants had agreed not to match other prices, and they thus ran no risk of illegally discriminating. One pricing official of USG acknowledged that "verification" would have been "stupid" while USG was not deviating from list prices (II A. 937). Defendants continued their practice, however, to be certain that no one was cheating on the agreements (II A. 615).

Even though National followed the policy against deviating from list prices in 1966 and 1967 (V A. 2475, 2478), Kenneth Atwell, its chief pricing official, nevertheless continued checking with competitors on any report of competition; respondent Brown, National's chairman of the board, knew and acquiesced (II A. 615, 668–669). Pricing officials of USG, G–P and Celotex similarly continued to police prices, terms and other alleged deviations from agreed-on practices and policies (II A. 575, 953–954; IV A. 2305; V A. 2552).

Contemporaneous documents from respondents' files show the purpose and usefulness of the practice. In January 1966 a G–P field manager complained to G–P's pricing administrator, Sikes, that a dealer was selling USG gypsum board at prices below those that all defendants had adopted on December 15, 1965 (IV A. 2299). The field manager attached to his memorandum the price sheets reflecting lower prices (IV



A. 2300–2301). Sikes then called USG, and, in a handwritten note on the incoming memorandum, he reported his conversation to his superior, A. L. Meyer (IV A. 2299):

> ALM
>
> Discussed this with B. E. (1). He will check and advise as to current price since attached list was dated 12/18/65
>
> R.S.

A. L. Meyer testified that the initials "B. E." referred to "Bob Evans," USG's director of merchandising, and the encircled number (1) was his "code" for USG (II A. 551–552). Meyer added that the purpose of Sikes' call was to have Evans "find out what the story was and report back" (II A. 552). He also admitted that the inquiry by Sikes pertained to the entire price sheet attached to the memorandum and that an explanation for these lower prices was expected from Evans (*ibid.*).

Similarly, G–P made "verification" calls to Celotex to gain assurances that sales would be on the basis of list price only (II A. 576–577; V A. 2452). Sometimes the assurances were achieved through policing calls involving as many as four companies (II A. 575–576; IV A. 2305), and the results were written in code by G–P's pricing administrator (II A. 579).

Price exchanges involved prices for entire marketing areas, not simply prices quoted to particular customers. For example, on March 2, 1966, McCaskill instructed Sikes to obtain G–P's "Okla City out of warehouse pricing structure" and provide it to Atwell of National (I A. 408; IV A. 2303). Sikes sent a

telegram to the field office (IV A. 2302) and obtained the prices by return telegram (IV A. 2304). He then "called K. A. [Kenneth Atwell] 3/4/66" and provided him with G-P's prices (I A. 408–409; IV A. 2304). McCaskill described this sharing of information as a "price verification" (I A. 409).

On another occasion National threatened through the "verification" process to give discounts to its dealers unless G-P warehouses raised their resale prices to contractors (I A. 411–413; IV A. 2306–2310; V A. 2597). G-P promptly directed all of its warehouses to adopt a minimum markup of five percent over list prices and so informed its competitors (V A. 2555–2561)." The defendants and their co-conspirators repeatedly took corrective action when their price discussions revealed that their field sales organizations had sold board at prices lower than those they had agreed on (see, *e.g.*, IV A. 2317–2319, 2321).

*c. Agreed-on credit terms*

The defendants also assiduously policed their agreements on terms and conditions of sale." In anticipa-

" G-P also obtained assurances from Celotex that it had "NO DEALS OF ANY KIND IN USA" (IV A. 2312). Meyer testified that this competitive contact (which also involved contacting Flintkote (IV A. 2311)), was a "verification" to avoid price discrimination (II A. 550–551). On another occasion, Miller of Celotex assured Meyer that "Celotex has no deal of any kind" in the entire marketing area of Mobile, Alabama, where there were allegations of price reductions by Celotex (II A. 546–548; IV A. 2316).

" Documents from defendants' files show extensive policing activity from 1966 to 1971 to ensure the success of the credit terms agreement. V A. 2489, 2492–2495, 2497–2500, 2505, 2507,



tion of implementing the March 1, 1966, terms (see pages 31–36, *supra*), Celotex instructed its regional credit managers to "make every effort to contact the competit[ors] involved" before submitting any request to meet alleged offers of special terms (V A. 2517). R. R. Campbell, National's credit manager, reported that he had cleared up any uncertainty regarding the intentions of Flintkote (V A. 2492):

> Rumor has it that Blue Diamond [Flintkote] is not following the other companies in this matter, but this is not so. Blue Diamond's letter is now in the mail, although it carries a date of February 11. I do not have a copy, but it has been read to me, and it is in line with the precedent set by other manufacturers.

On March 9, 1966, Campbell noted a conversation with USG's credit manager (V A. 2489):

> TERMS
>
> 3/9/66 Talked to Chuck Hamilton of USG. He has heard no rumors at all re any break in the terms, at least not among any of the major companies.
>
> Rollie [Campbell] 3/9/66

On April 26, 1966, Campbell reported to R. D. Barber, National's general credit manager, that the "first exceptions" to the new terms by Kaiser and Pabco (Fibreboard) had been "corrected" (V A. 2493)."

2511, 2513–2514, 2519, 2522, 2524–2525, 2527–2531; C.A. App. 1095ex–1096ex, 1117ex–1118ex, 1829ex–1839ex.

" Campbell also was active in "correcting" special credit terms that departed from the standard terms in effect for all defendants before March 1, 1966 (V A. 2532–2533).

The month before, Flintkote had received assurances from Kaiser that "[u]nder no circumstances will they violate the new terms starting March 1, 1966" (V A. 2524–2525).

Although the credit terms policing was generally handed by credit personnel, senior sales officials took an active interest occasionally. For example, Evans (Gimlin's replacement as director of merchandising at USG) wrote a note to respondent Watt (USG's executive vice president) dated May 5, 1967 (V A. 2490). The note and attached salesman's report revealed that National "recently admitted" making an interest-free loan, contrary to the defendant's agreed-on program. In a handwritten postscript to the memo, which had been relayed to Morgan as well, respondent Watt wrote (V A. 2490) "[w]e were led to believe they had no such arrangements—AJW."

In 1963 and 1966 the defendants sought to have the Gypsum Association take part in policing credit terms. On both occasions the Association's legal counsel advised that there was a legal "presumption against any confidential exchange of business secrets among competitors and that such an exchange had to be handled with careful attention to legal limitations" (V A. 2482). He also concluded that "[t]he area of legally permissible discussion would be relatively small" (V A. 2486) and must be limited to "facts concerning the financial and credit responsibility of delinquent accounts" (*ibid.*). Defendants abandoned any further attempt to involve the Association in this activity, which thereafter was carried on clandestinely (C.A. App. 409a–410a).



### 7. RESTRICTIONS OF COMPETITIVE PACKAGING AND HANDLING PRACTICES

During 1965 and 1966 the producers recognized that handling and packaging gypsum board for delivery, including the use of extra full sheets for dunnage, delivery of board on wood pallets, the use of end banding on stacks of board,[50] and strapping of sleuters.[51] to board units, was an important (and costly) aspect of service. They desired to eliminate some of these services but found competitive pressure to continue them, because better packaging and service for the same net price was the equivalent of a lower price to the purchaser (V A. 2563; C.A. App. 1546ex–1547ex, 1557ex, 1561ex, 1566ex, 1568ex–1571ex). The producers could compete in packaging and service as easily as in price, and steps were taken to eliminate this form of competition.

National and G–P in particular anticipated a rise in demand for special shipping services when price discounts were eliminated in 1965, and they ordered their sales staffs not to grant additional services without authorization from central headquarters (C.A. App.

[50] "End banding" or "strapping" means placing metal or nylon bands around the ends of stacked units of wallboard to prevent sagging or shifting during handling by power equipment (Gov't Exh. 1725, p. 1; Def. Exh. (USG)–6, p. 90).

[51] "Sleuters" (also "risers" or "spacers") are materials used under or between units of board to facilitate loading and unloading (Def. Exh. (USG)–6, pp. 89, 93). They permit entry of fork lifts between stacks, and strapping sleuters to a stack of board saves labor because the sleuters do not need to be moved manually each time the stack of board is moved (Gov't Exh. 1725, pp. 1-2).

482ex, 1544ex; Gov't Exh. 1700). Delivery practices were discussed at length by the Materials Handling Committee of the Gypsum Association during 1965 and 1966 (C.A. App. 1545ex–1556ex, 1567ex–1578ex) and privately between defendants (V A. 2563-2565; C.A. App. 1557ex–1562ex). Ultimately special delivery services were eliminated or closely limited.

The materials handling committee played a role in eliminating the use as dunnage of extra full sheets of wallboard. Full sheets used as dunnage often arrive in saleable condition (I A. 438; V A. 2568), and amount to a price concession (I A. 441). In 1965 the committee published "revised dunnage recommendations" for gypsum board (Gov't Exh. 1796), which recommended: "[D]on't use full dunnage sheets under wallboard units" (¶ III, 3). When one company found another using full boards as dunnage it called the competitor, and the practice stopped."

A West Coast handling committee meeting on November 19, 1965, the day of USG's no-discount price announcement, took up the use of full sheet dunnage under bundles of board, and "[i]t was the consensus

[52] Three such contacts were in evidence. First, G–P learned that Kaiser was using full board dunnage and wrote: "We are hoping [you will] discontinue this practice so that we will not be forced into this same type of practice for competitive reasons" (V A. 2563). Kaiser stopped it (V A. 2565, 2566). In November 1966 Fibreboard called G–P about the latter's use of full board dunnage, and G–P stopped (I A. 436–439; V A. 2567–2569). Later in November 1966 G–P called National to "verify" whether National was using full board dunnage, despite having a photograph of the practice and the eyewitness report of one of its salesmen (I A. 439–441; V A. 2570–2574).



of opinion that this dunnage was not necessary" and was "just a give-away program" (C.A. App. 1546ex). All of the participants (which did not include G-P) stated that they planned to eliminate full sheet dunnage (C.A. App. 1555ex). After reports in May 1966 that some companies, particularly G–P, were continuing to use full sheets under bundles (Gov't Exh. 1790, p. 2), a special meeting including G–P was held on June 14, and other producers told G–P that if it would eliminate the practice of bottom dunnage, the others would do likewise (C.A. App. 1589ex; Gov't Exh. 1726). After a follow-up meeting (Gov't Exh. 1878), G–P ordered the use of extra dunnage stopped (Gov't Exh. 1795).

Producers also were concerned that the use of expensive wood pallets might spread outside certain parts of the East. At the September 1965 materials handling committee meeting, specinl task forces were appointed to study a "palletizing program" (Gov't Exh. 1872, p. 6–7). The task forces recommended that wooden pallets be used on the West Coast only for export shipments (C.A. App. 1756a–1761a, 1551ex, 1556ex) and that the use of pallets be eliminated in Michigan, where it was already established (C.A. App. 1572ex–1575ex, 1578ex; Gov't Exh. 1744).

As a result, the use of wooden pallets never became a common practice on the West Coast (C.A. App. 1756a–1757a).[53] It was limited to the New York City

[53] In similar fashion, Gypsum Association committees were used to bring about agreements to restrict the end banding of wallboard units except in limited situations (Gov't Exh. 1872, pp.

and Michigan areas, and wood pallets were eliminated in Michigan in 1971 after the defendants assured each other that all of them would refrain from the practice."[54]

8. RENEWED PREDATARY PRACTICES

From December 1965 to early 1968 the major producers ceded to single-plant producers whatever sales their limited capacity allowed them to make (I A. 207–209). This strategy collapsed in 1968 when Republic, a single-plant producer, expanded its Oklahoma plant and announced plans to build new plants in Indiana and elsewhere (C.A. App. 647a–652a, 1481 ex–1483ex). The Indiana plant alone would have had one-third of the United States' population within its prime marketing area (C.A. App. 656a–658a).

Almost immediately after Republic's announcement, the major producers again began to meet price competition from the single-plant producers (II A. 891–892, 1027). Between early 1968 and early 1970 prices in Oklahoma and Texas dropped from more than $45 to only $26 per thousand square feet of regular half-inch board[55] while remaining substantially higher elsewhere (VI A. 3007–3011; C.A. App. 652a–653a,

405, C.A. App. 1545ex; Def. Exh. (USG)–6, p. 2) and to discontinue the practice of banding sleuters to board units (V A. 2563, 2565; Gov't Exh. 1872, p. 6; C.A. App. 1547ex, 1555ex, 1557ex–1562ex; Gov't Exh. 1873, p. 5, Gov't Exh. 1733, p. 2, Gov't Exh. 1880, p. 4).

[54] C.A. App. 1635a–1638a, 1800a–1806a, 1868a, 1581ex–1586ex; Gov't Exhs. 1738, 1764, 1765, 1767, 1769–1772, 1775, 1780.

[55] The $26 price was the short-run marginal cost for USG (II A. 930–931).



2402a–2404a, 1475ex–1480ex)." The prices for product lines that the small producers did not make were unchanged (III A. 1443–1444; C.A. App. 2575a–2678a).

Republic's break-even price was $36 per thousand square feet (C.A. App. 741a). It suffered a substantial loss in 1970 and was unable to build the additional plants (C.A. App. 653a).

9. EFFECTS OF THE CONSPIRACY

Despite industry overcapacity and declining demand that should have led to lower prices (IV A. 2256; C.A. App. 999ex–1000ex), prices rose in December 1965 and remained stable through 1967 (V A. 2478, 2541, 2543, 2548–2549, 2551; C.A. App. 1331a, 1305ex, 1359ex–1360ex). Officials of two corporate defendants testified to continued stability (even given discounts) until September 1968 (II A. 612, 1107–1108)."[57]

In 1969, in areas (such as Pittsburgh) not subject to competition from single-plant producers, average transaction prices paid by National's customers rose (C.A. App. 3683a). Prices on specialized products, such as vinyl-covered wallboard, remained stable or increased (C.A. App. 2677a–2678a, 3700a). Corporate officials testified that even in times of declining prices the decline probably would have been greater without

[56] Republic was able to ship board as far as California and sell there profitably at prices five percent less than those of the major producers (I A. 204–205).

[57] 1968 was characterized as the "best" year during the 1966–1973 period by USG's vice president (II A. 987).

the exchange of price information (I A. 377; II A. 588–589, 659).

10. CONTINUATION OF THE CONSPIRACY

After December 1968 the defendants continued the practices alleged in the indictment.[58] For example, the uniform credit terms adopted in 1966 remained in effect until the time of the trial. The agreements (or Gypsum Association "recommendations") regarding uniform delivery practices[59] also remained in effect through 1973. The defendants, acting in concert, stopped shipping gypsum board on pallets in Michigan in 1971, and none had used them again as of the time of trial (see pages 45–46, *supra*). Defendants successfully used predatory practices to prevent the expansion of Republic Gypsum Co.; these practices began in 1968 and continued at least until 1970 (see pages 46–47, *supra*).

The exchange of information on prices and credit terms also continued after December 1968. USG continued to cooperate by responding to inquiries from others until 1971 (II A. 828–830; V A. 2519). National admits that it continued the practice of exchanging prices until after this Court's decision in *United States* v. *Container Corp. of America*, 393 U.S. 333, on January 14, 1969 (II A. 591–592, 623, 674, 1002; III A. 1528–1529), but the evidence shows

[58] December 27, 1968, is the critical date for purposes of the statute of limitations.

[59] See Gov't Exh. 1796, ¶¶ III and IV (full sheet dunnage); Gov't Exh. 1880, p. 4 (banding sleuters to board units); Def. Exh. (USG) 6, p. 2 (end banding).



that National's personnel continued to provide information until mid-1971 (II A. 830–831; C.A. App. 1117ex).[60] Georgia-Pacific and Celotex continued seeking and giving information at least until 1972 (I A. 504–507; II A. 678–679, 826–831; V A. 2518–2523).

C. THE CHARGE TO THE JURY

The trial of this case began on March 4, 1975, and continued until July 8, 1975, when the jury was charged.

1. MEMBERSHIP IN THE CONSPIRACY

Because the defendants had played different roles in the alleged conspiracy charged, the district court gave extensive instructions emphasizing the duty of the jury to ascertain whether each one of the defendants had joined in the overall venture.

The court first told the jurors that "it is your duty to give separate consideration to the charges against each of the Defendants, whether they were a corporation or an individual. Each must be passed upon by you separately" (IV A. 1714).[61] The court then reviewed the allegations of the indictment (IV A. 1714–

[60] These personnel included Kenneth Atwell, the National vice-president who testified that he ordered the practice stopped in 1969 (II A. 623, 679). Atwell's assistant also made some calls to competitors in late 1969 (II A. 686–687, 696–697).

[61] See also IV A. 1767–1768 ("I have told you on numerous occasions that you must reach, treat each individual, each Defendant corporation or individual separately"). The court emphasized this charge in its supplemental instructions (IV A. 1772).

1716) and told the jurors that the prosecution need not prove all 13 of the means that the indictment alleged were used to carry out the conspiracy (IV A. 1716).

The court repeatedly emphasized the need to assess separately each defendant's participation in the entire venture. For example, when discussing G–P's acquisition of Bestwall, the court stated (IV A. 1726): "As with each and every Defendant, there must be proof beyond a reasonable doubt that Georgia-Pacific joined the conspiracy." Moreover, the court said, the proof must show that each conspirator "positively or tacitly came to a mutual understanding to try to accomplish a common, unlawful plan" (IV A. 1728), and that "[m]ere similarity of conduct" (*ibid.*) would not establish a crime.

The court also used generally accepted instructions to describe the requisites of membership in the conspiracy.[62] The instructions included the following:

> Before the jury may find that a defendant or any other person has become a member of a conspiracy, evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. * * * [S]o, if a defendant or any other person, understanding the unlawful character of a plan,

[62] The instructions were substantially identical to pattern instructions for antitrust cases. See 1 Devitt and Blackmar, *Federal Jury Practice and Instruction* ch. 23 (2d ed. 1970).



> intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he, therefore, becomes a knowing participant, a conspirator. * * * An individual's membership in a conspiracy must be established by evidence as to his own conduct, what he, himself, knowingly said or did. [IV A. 1729.]
>
> * * * * *
>
> If it appears beyond a reasonable doubt, from the evidence in the case, that the conspiracy *alleged in the indictment* was knowingly formed and that any Defendant knowingly became a member of the conspiracy, either at the inception of the plan or scheme or afterward, then the success or failure of the conspiracy to accomplish the common purpose or object is immaterial. [IV A. 1730; emphasis added.]
>
> * * * * *
>
> Now, there are two essential elements which must be proved in order to establish the offense of conspiracy as charged in this indictment:
>
> First, that the conspiracy described in the indictment was knowingly formed and was existing at or about the time alleged; and,
>
> Second, that the defendants knowingly became members of the *conspiracy as charged*.
>
> If the jury should find—you, the jury, should find, beyond a reasonable doubt, from the evidence in the case, that existence of the conspiracy charged in the indictment has been proved, then the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been knowingly a member of the conspiracy, regardless of whether such a person knowingly became a member at its in-

ception or the beginning of the conspiracy or afterward, during the continuance of the conspiracy. [IV A. 1733–1734; emphasis added.]

* * * * *

[T]here is a danger that a Defendant will not be judged solely upon the evidence applicable to him. In this regard, you must consider the evidence as to each Defendant separately.

You have two questions to determine: First, whether there was a conspiracy of the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were knowing participants in it. This involves an examination of the evidence, separately, with respect to each Defendant. [IV A. 1735.]

* * * * *

In addition, you would not be warranted in finding any individual Defendant guilty, unless you find beyond a reasonable doubt that, knowing of the existence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier. [IV A. 1738–1739.]

2. THE ELEMENTS OF THE OFFENSE

The district court made it clear that the defendants were charged with a conspiracy to fix or stabilize prices through various devices. It emphasized that the essential element of the offense was *agreement* to fix or stabilize prices.

The court explained (IV A. 1715) that "[f]ixed prices are agreed upon prices. They are not necessarily uniform. It is illegal to fix prices, whether you fix them uniformly or not. * * * [P]roof of an agreement to do any one of these, that is to fix, to raise, to maintain or stabilize the price or terms and conditions of sale of gypsum wallboard would be sufficient to sustain a conviction * * *." "[T]he central and controlling element here is the element of agreement. It is not a violation of the Sherman Act for competitors to adopt substantially similar or even identical prices or terms of sale of another competitor, unless that is done pursuant to an agreement * * *. The agreement is the crux of the violation" (IV A. 1717). See also IV A. 1728, 1731, 1774–1775. The court also told the jury that the agreement need not be formal but may be inferred from other circumstances (IV A. 1709).



The court instructed the jury that an agreement to fix or stabilize prices or terms and conditions of sale is *per se* illegal, and that the success of the endeavor is irrelevant (IV A. 1732–1733). The court also stated (IV A. 1734) that "the fact that a defendant may have believed, in good faith, that was being done was not unlawful would not be a defense. A conspiracy to raise, fix, maintain and stabilize prices * * * is unlawful, even though the conspiracy may be formed or engaged in for what appears, to the conspirators, to be laudable motives. A price fixing conspiracy, such as charged in the indictment cannot be justified in the law, even though the conspiracy may have been formed or engaged in to prevent or halt ruinous competition or to

eliminate the evils of price cutting or to give each competitor what the competitors think is his fair share of the market."

The court distinguished lawful persuasion from unlawful agreement. It told the jury that a trade association, such as the Gypsum Association, "may legally educate its members in the proper conduct of their business" and conduct "an educational program * * * to convince another individual or a company that the practices advocated by the association are more sound than the prevailing practices in the industry" (IV A. 1709). Moreover, "[a] business concern may even copy the price list of a competitor or follow exactly the price changes of a competitor, and that * * * would not be a violation of law, unless such acts were done pursuant to an agreement, arrangement, or understanding" (IV A. 1732).

3. THE EXCHANGE OF INFORMATION

The indictment alleged that the defendants exchanged price and other competitive information as one of the means of fixing prices and carrying out the agreement to do so. The district court told the jury that the defendants did not dispute that they exchanged information, and it discussed their two defenses: that there was no agreement to exchange information, and that they exchanged information only "to insure their compliance with another antitrust law known as the Robinson-Patman Act" (IV A. 1719)."

* The court supplemented this by telling the jury (IV A. 1764) that the defendants also contended that they exchanged information "to avoid being defrauded."



The court outlined the elements of the "meeting competition" defense to a charge of price discrimination and instructed the jury that a seller could defend a charge of price discrimination by showing that "he believed, in good faith, that one of his competitors had charged or offered that lower price to that particular customer" (IV A. 1720). The court then stated that the jury must resolve the issues as follows (IV A. 1720–1722; emphasis added):

> First, you must determine whether there was an agreement, either implied or express, to engage in the practice of price checking or verification.
>
> • • • •
>
> Secondly, you must determine whether the purpose for the exchange of competitive information * * * was to insure a good faith meeting of competition as a defense to the Robinson-Patman Act.
>
> If you decide that, *if you decide this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone,* as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.
>
> However, if you decide that the *effect* of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider *these [ex]changes* as *evidence* of the mutual agreement or understanding alleged in the indictment * * *.
>
> • • • • •

> • • • If the *effect* of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, *regardless of the specific purpose* that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense.
>
> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the *effect* of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

In sum, the district court told the jury that if it found an agreement to exchange price information, the agreement violated the Sherman Act—regardless of the purpose of the exchange—if it had the effect of fixing or stabilizing prices. In the absence of such an effect, however, the agreement to exchange information would be lawful if the defendants exchanged the information as part of a good faith effort to establish a defense to charges of price discrimination. The court repeated this instruction in a supplemental charge to the jury (IV A. 1778–1780, 1782).

### 4. THE STATUTE OF LIMITATIONS

The indictment was filed on December 27, 1973, and respondents argued that they could not be convicted because they had not engaged in a conspiracy within the five-year statute of limitations. The district court



gave the following pertinent instructions (IV A. 1725–1726):

> [Y]ou cannot find any of these Defendants guilty unless you find beyond a reasonable doubt that a conspiracy continued or existed within the period beginning December 27, 1968, and ending December 27, 1973. • • •
>
> • • • • •
>
> This does not mean, however, that you must exclude from consideration evidence of acts or conduct prior to December 27, 1968. A conspiracy may be a continuing thing • • •. Therefore, you may consider evidence of Defendants' conduct prior to December 27, 1968, insofar as it may tend to prove a design or intent or pattern with respect to their conduct after December 27, 1968, or to show the formation of a conspiracy prior to that date which continued thereafter • • •.
>
> • • • • •
>
> The Government was entitled to prove when, if ever, the alleged conspiracy began and what its purpose was, but I caution you that you must consider such early acts in reaching your verdict only if you find that there was proof beyond a reasonable doubt that the conspiracy charged was in existence after December 27, 1968. • • • [In order to convict] you must find that one or more of the members of that conspiracy performed an act after that date to further the objectives of that conspiracy.
>
> • • • • •
>
> Now, in order for you to find beyond a reasonable doubt that the agreement continued be-

yond December 27, 1968, you need not find the agreement previously entered into was renewed or reaffirmed by each of the members after that date.

The law is that if there is a conspiracy to do an unlawful thing which has a continuing purpose or objective, it is considered to continue whenever one member of the conspiracy does some act in furtherance of the conspiracy.

In a supplemental charge, the court instructed that in order to convict the jury must find that "something happened after December 27, 1968, in furtherance of the conspiracy" (IV A. 1814).

5. WITHDRAWAL FROM THE CONSPIRACY

The defendants contended that, even if they had entered into a conspiracy, one or more of them withdrew from it before December 27, 1968, the critical date for purposes of the statute of limitations. The court gave the following instruction (IV A. 1732):

In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find, from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant must either have affirmatively notified each other member of the conspiracy [that] he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.



Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise.

The court allowed counsel for respondents to argue to the jury that the open resumption of competition was a sufficient step disassociating the competitor from the conspiracy. See Pet. App. 61a–63a.

6. REACHING A VERDICT

At the conclusion of the first charge to the jury, the court told it to (IV A. 1767)—

undertake in a businesslike manner to determine the innocence or guilt of each defendant individually.

It is your duty now to consult with one another and to deliberate with a view toward reaching an agreement, if you can, without violence, to individual judgment.

Each of you must decide the case for yourself. I suggest that you do so after consideration in an impartial manner of all the evidence with your fellow jurors.

Don't hesitate to re-examine your own views or change those views if you are convinced that they are erroneous. But do not surrender your honest convictions as to the weight or effective [*sic*] evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a verdict.

The jury retired to deliberate at 5:07 p.m. on Tuesday, July 8, 1975 (IV A. 1768). On July 9 and 10 the court delivered supplemental instructions to the jury in response to questions. At 4:15 p.m. on Friday, July 11, the court told counsel that "some of the jurors aren't feeling well" (IV A. 1806) and suggested that deliberations could be shortened or recessed to allow the jurors to rest. Counsel for respondents resisted allowing the jurors to go home for the weekend or to take a day off from deliberations (IV A. 1806–1809), and the district court, after discussing the problem with the foreman of the jury, decided to shorten the hours of deliberation in order to deal with the nervous tension of a few jurors (IV A. 1809–1811).

At 2:45 p.m. on Saturday, July 12, the jury asked for further instructions on a number of matters. The district court gave the assistance the jurors had requested and then, *sua sponte*, told them (IV A. 1815):

> Now it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, so long as you can do that without violation to your individual judgment.
>
> Each of you, of course, must decide the case yourself only after an impartial consideration of all the evidence in the case, with your fellow jurors.
>
> In the course of your deliberation, do not hesitate to re-examine your own views or change your opinion, if you are convinced it is erroneous. Do not surrender an honest conviction solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. But consult conscientiously and freely with each other and re-examine your own views, if that becomes necessary, within the limits I have stated.



At 4:07 p.m. on Sunday, July 13, the jury sent a note to the court that it was unable to reach a verdict (IV A. 1817). The court responded (IV A. 1818):

> I have told you before and I am going to tell you again it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement. Of course, you must do so without violation to individual judgment, but only after an impartial consideration of the evidence in the case with your fellow jurors.
>
> You should not hesitate to re-examine your views and change your opinion, if convinced it is erroneous.
>
> Of course, you should not surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or solely for the mere purpose of reaching a verdict.
>
> You will continue your deliberations.

The district judge then told counsel: "Gentlemen, after a four-month trial, I have no intention of easily declaring a mistrial. They are going to continue their deliberations" (*ibid.*). One defense attorney moved for a mistrial because "[i]t is obvious, we believe, that the jury is deadlocked" (IV A. 1819). The court declined to declare a mistrial.

At 11:35 a.m. on Monday, July 14, the court received a request from the foreman of the jury to have a private meeting "to discuss the condition of the jury and further guidance" (IV A. 1820). The court discussed the request with counsel and obtained unanimous consent to have the private meeting, on condition that the transcript of what was said would be sealed (IV A. 1820–1826). At the conclusion of the meeting, the judge advised counsel that it was his understanding that there were personality conflicts on the jury (IV A. 1826). All defendants moved for a mistrial, arguing that further deliberations would create "the danger of the coerced verdict" (IV A. 1827). The district court declined to grant the motion and stated that it would wait until Friday, July 18, before considering further whether to grant a mistrial because of jury disagreement (IV A. 1828). The jury reached a verdict in the morning of Tuesday, July 15 (IV A. 1829).

The court of appeals ordered the transcript of the discussion between the judge and the jury foreman to be unsealed (IV A. 1835–1836).[44] The transcript revealed that the foreman had told the district judge that some jurors "are getting very distraught" (IV A. 1837) but that "we have overcome" the previous "personality conflicts" (IV A. 1838). The discussion concluded (IV A. 1839–1840):

[44] Judge Garth dissented from this order. He concluded that the defendants had waived their right to see the transcript by agreeing to the meeting with the conditions the district court had announced (IV A. 1836).



MR. RUSSELL [Foreman]. I am asking you what I should do. I am to the point——

THE COURT. I would like this jury to deliberate longer. I say that because, as I say, we have tried it for a considerable period of time.

MR. RUSSELL. Everybody realizes that and I do.

THE COURT. We have individual people here who are concerned and the jury has now deliberated—they deliberated three full days, Wednesday, Thursday and Friday. They deliberated a half a day on Saturday and a half day on Sunday. They are not deliberating a full day, because jurors usually deliberate until eleven or ten at night.

MR. RUSSELL. We know that and we want to thank you.

THE COURT. You have not deliberated that long yet.

MR. RUSSELL. I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.

THE COURT. Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?

MR. RUSSELL. In my opinion, it is. I have to rely on that. I have no experience in this kind of thing, I don't know what people go through in a jury. This is the first time I have ever served on one and it is a new experience and I will never forget it. But it is a terrible responsibility and what I said, if it was a matter of finding a document or finding a part of a testimony that would convince somebody, I would say sure, and good.

THE COURT. All right.

For the time being continue your deliberations. I will take into consideration what you have told me.

MR. RUSSELL. As I said, the health problem is something that I think has to be looked at. I don't know how you are going to judge this or whether you call Mr. Keene and ask him or the Marshal's opinion, but I think something ought to be done.

THE COURT. All right. I will take it into consideration. I have to talk to counsel.

MR. RUSSELL. I appreciate that. I didn't expect a decision, but I would like some kind of guidance.

THE COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.

MR. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after.

THE COURT. Oh, I am not after anything.

MR. RUSSELL. You are after a verdict one way or the other.

THE COURT. Which way it goes doesn't make any difference to me.

MR. RUSSELL. They keep saying, "If you will tell him what the situation is, he might accept it."

I said, "He doesn't want to know. He told me that he doesn't want to know what the decision is."

THE COURT. No, I don't want to know that. It would not be proper for me to know.



MR. RUSSELL. You may imply something from what I said.

THE COURT. I can imply something from just watching, but I don't want you to tell me. That would be a breach of your duty.

MR. RUSSELL. I have told you as best I can.

THE COURT. Thank you. You tell them to keep deliberating and see if they can come to a verdict.

### D. THE DECISION OF THE COURT OF APPEALS

The court of appeals unanimously rejected respondents' claim of unconstitutional pre-accusation delay (Pet. App. 5a–11a). The panel divided, however, with respect to the proper disposition of three other criminal procedure issues and the antitrust issue.

Judges Hunter and Adams, over the dissent of Judge Weis, concluded that the district court should have instructed the jury that if respondents' sole purpose in exchanging price information was to establish a defense to price discrimination charges, then the exchanges were lawful notwithstanding their effects on prices. In their view, *United States* v. *Container Corp. of America*, 393 U.S. 333, allows competitors to exchange price information, despite a stabilizing effect on prices, "[w]here the information exchange occurs under a 'controlling circumstance'" (Pet. App. 18a). The court held that a purpose to acquire information that might be pertinent to a defense against price discrimination charges was such

a "controlling circumstance" and therefore would establish a defense to charges under the Sherman Act (*id* at 12a–29a)."[5]

Judge Hunter concluded that the instructions to the jury had not made it sufficiently clear that each defendant could be convicted only if shown to have joined in the overall venture, and not just in some subsidiary agreement (Pet. App. 29a–36a). He also concluded that the instructions had improperly limited the jury's consideration of respondents' arguments concerning withdrawal from the conspiracy (*id.* at 36a–39a). Judges Adams and Weis did not agree with these conclusions (*id.* at 29a n. 11, 39a n. 16, 50a), and Judge Weis stated that Judge Hunter had concentrated on isolated instructions and failed to consider the instructions as a whole (*id.* at 56a–63a).

Judge Adams concluded that a conversation between the district judge and the foreman of the jury after several days of the jury's deliberations coerced the jury to reach a verdict (Pet. App. 40a–49a). Judge Hunter did not express an opinion on this subject, and Judge Weis concluded that the communication with the foreman was not coercive (*id.* at 63a–69a).

[5] The court stated that the jury should be instructed that a price information exchange is lawful, regardless of its effects, if (1) it is undertaken solely to establish a defense to Robinson-Patman Act charges; (2) a seller first resorts to all reasonable means of price verification other than discussing price with its competitor; (3) the seller seeking price verification has a good reason to doubt the veracity of price representations made by a buyer; and (4) each price communication with a competitor concerns only one price and one buyer. See Pet. App. 28a–29a.



Judge Weis, dissenting with respect to the antitrust holding, stated the majority had accepted an argument that this Court rejected in *Container* (Pet. App. 50a–55a). He concluded that the Robinson-Patman Act does not require a seller to undertake a price "investigation which itself is illegal either because it results in price fixing or violates other provisions of law" (*id.* at 53a).

## SUMMARY OF ARGUMENT

### I

Price information exchanges between competitors are a useful conduit for establishing price-fixing agreements. They may be used to "police" existing agreements to fix or stabilize prices and to retaliate against "cheaters." Moreover, the exchange of current price information discourages price competition because it facilitates prompt price-matching, a practice that makes it impossible for any competitor to increase its sales by reducing its prices. Price concessions must remain secret from competitors—at least at the outset—in order to be commercially attractive. This Court therefore has held that price information exchanges are illegal when they have the purpose or effect of fixing or stabilizing prices.

The jury found that the price information exchange in the gypsum board industry had the effect of fixing or stabilizing prices. The court of appeals concluded

that price information exchanges would be lawful, despite this effect on prices, if prices were discussed between sellers only during good faith attempts to "verify" reports of price concessions. The court of appeals believed that a good faith attempt to "verify" prices by discussing them with competitors was an essential element of compliance with the Robinson-Patman Act, and that this amounted to a "controlling circumstance" excusing noncompliance with the Sherman Act.

But there is no general "controlling circumstance" exception to the Sherman Act. Price information exchanges are unlawful, regardless of their motive, if they have the effect of fixing or stabilizing prices. Because there is no general "controlling circumstance" exception to the Sherman Act, the appropriate inquiry is whether the Robinson-Patman Act necessarily grants sellers a privilege to engage in conduct that otherwise would violate the Sherman Act. This inquiry is governed by the principle that repeals by implication are not favored. There is no need to carve out a Robinson-Patman Act exception to the Sherman Act, because the statutes can be reconciled easily.

The Robinson-Patman Act sometimes permits a seller to match a competitor's price, but it never compels price matching. The meeting competition defense rests on a recognition of competitive rivalry, and it was not designed to be a justification for competitors' collaboration. It is not illegal to match a competitor's price, but the desire to do so should not create a privilege to violate some other statute.



A seller may perfect his defense to a charge of price discrimination by doing everything reasonably feasible—except violating some other statute—to verify a buyer's statement that the buyer has been offered a lower price. If the seller cannot verify that the buyer is lying, the seller is entitled to make the sale; it is never necessary to discuss prices with competitors. The seller has other options as well: he can gamble on the buyer's veracity and reduce his price without "verifying" the buyer's story; if he thinks the buyer is lying he can decline to "match" what he believes to be a nonexistent offer; he can generally reduce his prices to meet the competitor's offer and thus refrain from price discrimination; and he can decline to reduce his price to anyone. None of these options requires price information exchanges between competitors.

The Robinson-Patman Act's general aim, after all, is to prevent price discrimination rather than to establish a justification for either discrimination or price-fixing. The Robinson-Patman Act no more contemplates that the seller will engage in illegal price exchanges to obtain price information than that the seller will burgle his buyer's office to obtain price information.

II

The district court's other instructions to the jury were correct.

A. The district court made it clear that the jury could convict a defendant only if it first found that he or it had joined the entire conspiracy rather than

some subsidiary agreement. Although the district court did not go on to charge that a defendant who joined a subsidiary agreement without knowingly joining the conspiracy alleged in the indictment was not guilty, this would have been no more than another way of stating what the court already had told the jury. "[I]t is unrealistic to believe that the lack of a semantical refinement in a lengthy and otherwise adequate charge had any effect whatsoever on the verdict" (Pet. App. 60a).

B. The instructions concerning withdrawal from the conspiracy also were adequate. The instructions allowed the jury to find withdrawal if a conspirator took "affirmative action to disavow or defeat" the conspiracy (IV A. 1732) and the court allowed respondent to argue to the jury that resumption of competition amounted to such "affirmative action." No more was necessary.

C. The court did not coerce the jury to reach a verdict. Three times the court told the jurors that none of them should surrender a conscientiously held position for the purpose of reaching a verdict. The court's conversation with the foreman of the jury—a conversation to which respondents and their attorneys consented—did not detract from the force of this repeated instruction. The court implicitly told the foreman that it would prefer a verdict to a mistrial, but this simply stated what was evident from the court's request that the jury continue deliberating. Because it was proper to require the jury to continue deliberating, the court's further remarks were harmless.



## ARGUMENT

## I

### PRICE INFORMATION EXCHANGES THAT INCREASE OR STABILIZE PRICES ARE UNLAWFUL WHETHER OR NOT THE SELLERS DESIRE TO TAKE ADVANTAGE OF THE "MEETING COMPETITION" DEFENSE TO THE ROBINSON-PATMAN ACT

The indictment in this case charged that respondents and others engaged in a conspiracy spanning many years to fix or stabilize the price of gypsum wallboard. The proof, taken in the light most favorable to the prosecution,[66] showed that respondents did so. One of the devices they used to carry out the overall agreement was the exchange of information between the major producers concerning prices, terms of sale, and other competitive variables. The evidence showed that the exchange of information assisted the conspirators in two ways: first it provided an opportunity to agree on prices; second, it served as a method to detect deviations from the agreed-on prices.

The district court instructed the jury concerning each of the methods and devices described by the indictment. The instructions concerning information exchanges, which are reproduced at pages 54–56, *supra*, told the jury that it must decide whether the exchange of information had the effect of increasing, fixing or stabilizing prices, and that if it found such an effect it should convict regardless of the reason respondents engaged in the practice. Judge Weis thus

[66] *Glasser* v. *United States*, 315 U.S. 60, 80.

accurately observed that "the jury verdict establishes the fact of effect upon prices" (Pet. App. 52a).[27]

The court of appeals unanimously concluded (Pet. App. 16a–19a) that information exchanges ordinarily are unlawful when they in fact fix or stabilize prices. The court of appeals thus held that the United States had presented a *prima facie* case that respondents' conduct was prohibited by Section 1 of the Sherman Act. A majority of the court nevertheless concluded that sellers may defend by arguing that they exchanged price information to take advantage of the "meeting competition" defense to a charge of price discrimination. The court of appeals' creation of this novel defense to a *prima facie* case of price fixing is unsound.[28]

[27] The court also told the jury that it should convict if it found that respondents had a purpose to fix or stabilize prices. But if the jury found such a purpose, it necessarily would have concluded that respondents did not act for the sole purpose of establishing a "meeting competition" defense to charges of price discrimination. Because the jury's verdict does not logically exclude the possibility that respondents had such a purpose (but see pages 93–95, *infra*), the verdict must be treated as if it stood entirely on the jury's conclusion that the information exchange affected prices.

[28] Our petition presented three questions for decision by this Court. Respondents' two briefs in opposition suggested that they would raise a number of other issues, including their argument that the evidence is insufficient, as alternative grounds in support of the judgment below.

We believe that this Court has the authority to pass on respondents' contentions. *Langnes* v. *Green*, 282 U.S. 531; *Hankerson* v. *North Carolina*, No. 75–6568, decided June 17, 1977, slip op. 6 n. 6. (Respondents could not, however, seek an alteration of the judgment in their favor, and arguments concerning the insufficiency of the evidence therefore could be urged only in support of a remand for a new trial, not as a reason for outright acquittal. See *United States* v. *New York Telephone Co.*, No. 76–835, decided December 7, 1977, slip op. 6 n. 8). But the case already requires decision of a number of difficult issues, and respondents concede that their arguments are not of general importance. See Joint Br. in Opp. 17, 23. Because respondents' arguments would not independently warrant review, they should not be considered here. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226–227 n. 2; *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2. To the extent they were pretermitted by the court of appeals in light of its resolution of other issues, respondents' contentions remain open for decision on remand from this Court. *United States* v. *Pomponio*, 429 U.S. 10, 13.

Ordinarily we would address the issues respondents have raised, even though we urge the Court not to decide them. But respondents Brown and Nicely raised many of these issues in a cross-petition, No. 76–1556, which the Court has not granted. We infer from the Court's decision not to grant the cross-petition that it does not intend to reach any issues other than those presented by our petition, and we therefore do not address in this brief the arguments respondents raised in their briefs in opposition or in No. 76–1556. (The arguments are addressed summarily in our brief in opposition in No. 76–1556 and our reply memorandum to the briefs in opposition in this case.)



### A. PRICE INFORMATION EXCHANGES BY COMPETITORS IN OLIGOPOLISTIC MARKETS ASSIST IN FIXING OR STABILIZING PRICES

Exchanges of information between competitors occupy a position in the grey areas of antitrust law. Many forms of communication about price are valuable. Producers cannot know how much to produce unless they know what prices their products will fetch, because production is attractive only if there is a difference between the cost of production and the selling price. It is essential that information on production costs and selling prices be widely available, for only an abundance of such information can guide

a producer in choosing among the many lines of commerce in which to compete.

Indeed, one of the basic assumptions of economic models of perfect competition is that all producers and consumers have full access to all information about costs and prices. Because the gathering and dissemination of full information is an important goal in a market economy, "the natural effect of the acquisition of wider and more scientific knowledge of business conditions * * * can hardly be deemed a restraint of commerce" (*Maple Flooring Manufacturers Assn.* v. *United States,* 268 U.S. 563, 582).

But there is another side to exchanges of information. Information may be misused, and its misuse is more likely in some situations than in others. Many times the essence of competition is the ability or willingness of one rival to decrease its prices in order to make more sales. Once sellers start offering lower prices, others are compelled to follow suit. Prices soon find the competitive level, and any cartel or conspiracy is undermined. A reduction in price is attractive, however, only if it escapes detection long enough to allow the seller to make its increased sales.

So long as its costs of production remained constant, a seller would not reduce its price unless it could recoup, through greater sales volume, the reduction in per-unit profit. If other sellers learn of price reductions quickly, they can immediately match the reduction and prevent the first seller from enjoying greater sales. The prospect of routine price-matching, one of the conceded purposes of the information exchange in which respondents engaged (Pet. App. 12a), therefore would deprive sellers of an important incentive to reduce prices.[*]



Exchanges of price information also are useful if not essential parts of a plan to "police" agreements to fix prices. The exchange deters cheating, because other competitors would quickly discover the price reduction and retaliate against the price cutter.

Finally, exchanges of price information may be useful for establishing price-fixing agreements. The information conveyed from one competitor may serve as an "offer" to fix prices at a particular level, and another competitor will be induced to "accept" by charging the identical price if it can be assured—through a continuation of the program of information exchange—that all of its important competitors will do likewise. The exchange apparently served that function in the gypum industry (see pages 10–16 and 21–35, *supra*), and this Court has held that information exchanges with that effect are illegal. *American Column & Lumber Co.* v. *United States,* 257 U.S. 377, 400, 410; *United States* v. *American Linseed Oil Co.,* 262 U.S. 371.

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[*] In other words, price information exchanges may reduce or remove the "ignorance and uncertainty about the behavior of rivals [that] is an important competitive element in the market" (Kaysen and Turner, *Antitrust Policy* 150 (1959)). See generally Nutter and Moore, *A Theory of Competition*, 19 J. Law & Econ. 39 (1976), for a discussion of the role of ignorance of competitors' prices in promoting price reductions. See also Areeda, *Antitrust Analysis* 15, 224–223, 292 (1974); Scherer, *Industrial Market Structure and Economic Performance* 208–210 (1970).

Since those cases were decided it has not been doubted that it is unlawful for competitors to exchange information about their prices when the exchange has the effect of increasing, fixing or stabilizing prices.[70] See, *e.g.*, *United States* v. *Container Corp. of America*, 393 U.S. 333;[71] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781–783. Because some exchanges of price information have a beneficial effect, it is not a *per se* violation of the antitrust laws to exchange competitive information.[72] But once an effect on prices has been demonstrated, no motive, however benign, is sufficient to excuse the practice. *Container*, *supra*, 393 U.S. at 337; *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 599–600.

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[70] The holdings of these cases have been reaffirmed repeatedly, even in cases concluding that particular information exchanges were lawful. See, *e.g.*, *Maple Flooring*, *supra*, 268 U.S. at 577–578, 580–581; *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, 593; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 374–375; *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 599–601.

[71] The Justices disagreed in *Container* about whether it had been shown that the defendants' activities stabilized prices, but all nine Justices concluded that such an effect would be a sufficient foundation for the imposition of liability, without respect to the purpose of the exchange. See 393 U.S. at 337 (opinion of the Court), 339 (Fortas, J., concurring), 343 (Marshall, J., dissenting).

[72] See *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 113; *Maple Flooring*, *supra*; *Cement*, *supra*. The Court emphasized in both *Maple Flooring* (268 U.S. at 567, 576, 586) and *Cement* (268 U.S. at 606) that the United States neither alleged nor proved that the exchange of information affected prices or was part of an agreement among the competitors to fix prices. In the present case, by contrast, the indictment alleged, and the evidence proved, that the price information exchange was part of a broader price-fixing conspiracy and that it affected prices.



Price information exchanges are most detrimental to free competition when several conditions coalesce.[73]

(1) Concentration in the sellers' market facilitates collusion. The fewer the sellers, the easier it is to agree on prices—even informally—and to police the agreement through means such as price information exchanges. The gypsum industry is highly concentrated (see page 7, *supra*), and all of the major sellers participated in the price information exchange program.

(2) When there are few small sellers it is practical for the major producers to eliminate competition among themselves and increase their profit, ceding a small part of the market to small sellers that cannot quickly increase production. The exchange of price information facilitates the agreement not to compete against small sellers. The evidence in this case indicates that respondents followed that course (see pages 25–31, 37–40, *supra*).

(3) When demand is inelastic—that is, when demand is not price-sensitive and an increase in price increases the gross revenue of sellers—conspiracies to fix prices are highly profitable and the potential gains from collusion are at their greatest. Even a limited agreement among competitors may have a significant effect on price. Moreover, because a reduction in price by one competitor would reallocate sales from one

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[73] The following discussion is based on the circumstances enumerated by this Court in *Container*, *supra*, 393 U.S. at 337, and on the thorough analysis in Posner, *Antitrust Law: An Economic Perspective* 55–71, 135–147 (1976).

competitor to another rather than create new sales, members of a conspiracy have an incentive to use price information exchanges as a most effective tool to police the agreed-on prices. The evidence indicates that the demand for gypsum board was inelastic (see page 7, *supra*).

(4) When it takes a long time for new entrants to begin production or for current producers to expand production, the conspirators will be able to enjoy monopoly returns for some time before competition erodes their position. When entry threatens, an exchange of price information may allow the competitors to adjust prices in particular markets to make the entry unattractive. The record discloses that entry into the gypsum industry takes several years, that respondents were able to turn the delay to their advantage, and that price information exchanges were used to facilitate responses to threatened or actual expansion of production by other sellers (see pages 25–31, *supra*).

(5) The more standardized a product is, the easier it is to agree on a price to be charged and to detect deviations from that price. Competitors could not offer effectively lower prices by improving the quality of gypsum board offered at a fixed price, and quality competition would not "compete away" the profits of collusion. Gypsum board is a standard product, and competition is in price rather than in quality (see page 7, *supra*). It therefore was relatively simple for respondents to gather price information and,



through a system of exchange, discourage departures from the standard price.

(6) Price disclosures that pertain only to past transactions cannot be used to thwart competition at the outset. If disclosure is delayed, a competitor can increase its sales for at least a short time by offering lower prices than its competitors. If information is exchanged in advance of sales, however, as it was in this case, price reductions can be "matched" and will be a losing proposition to the price-cutter. This discourages reductions in price.

(7) Price information disclosed to buyers can facilitate intelligent purchasing decisions and so has more value to the market than information that sellers keep to themselves. Respondents did not disclose information to buyers.

All the economically significant criteria point in the direction of a conspiracy to fix prices carried out and policed through exchanges of price information in this case. The evidence supports the economic indications, for there is explicit evidence of collusion. The jury's verdict establishes that respondents' conduct fixed or stabilized prices. Under any standard, then, the court of appeals was correct in concluding (Pet. App. 16a–19a) that respondents' practices were anti-competitive.

### B. A DESIRE TO AVOID ILLEGAL PRICE DISCRIMINATION DOES NOT JUSTIFY A PROGRAM THE EFFECT OF WHICH IS TO RAISE OR STABILIZE PRICES

Section 2(a) of the Robinson-Patman Act provides that no person shall discriminate among his buyers

in price, where that discrimination may injure competition and is not justified by a real difference in the cost of supplying the different customers.

Section 2(b) of the same statute creates an exception to that rule: a seller may defend against an allegation of price discrimination by proving that it charged the lower price because of a good faith belief that it was meeting competition from another seller. This "meeting competition" defense is a reflection of economic reality: a seller will not lose a profitable sale simply because it cannot charge as high a price as it can get elsewhere from other customers. See generally *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231. But the meeting competition defense is an exception to the basic rule of the statute: price discrimination is forbidden. *Federal Trade Commission* v. *A.E. Staley Manufacturing Co.*, 324 U.S. 746.

The counterpart to Section 2(b) is Section 2(f), which prohibits buyers from attempting to obtain price concessions that they know would violate the rule of Section 2(a). See generally *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U.S. 61; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 557 F. 2d 971 (C.A. 2), petition for a writ of certiorari pending, No. 77-654; *Kroger Co.* v. *Federal Trade Commission*, 438 F. 2d 1372 (C.A. 6), certiorari denied, 404 U.S. 871.

Under Section 2(b) of the Robinson-Patman Act, a seller of gypsum board could charge a discriminatorily low price for its board if, say, that were necessary to



meet an equally low price offered by a single-plant producer. But a seller could discriminate among its buyers only if it believed in good faith, acting in a commercially reasonable way, that it was not charging a lower price than any competitor. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., supra,* 324 U.S. at 758–760. This means, as a practical matter, that sellers must attempt to "verify" reports of price concessions before they may discriminate among their customers.

*1. There is no "controlling circumstance" exception to the Sherman Act*

The court of appeals held that if the price information exchange among the major producers of gypsum board was nothing more than a good faith attempt to "verify" reports of price concessions for the purpose of meeting competition, then it was not forbidden by the Sherman Act. This decision—which has drawn extensive critical commentary [7]—was apparently based primarily on a misreading of this Court's opinion in *Container.*

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[7] Every commentator who has discussed the opinion of the court of appeals has concluded that it is incorrect and, if followed, would seriously undercut the purposes of the antitrust laws. See, *e.g.*, Note, *Meeting Competition Under the Robinson-Patman Act*, 90 Harv. L. Rev. 1476, 1491–1494 (1977); Note, *Antitrust Liability for an Exchange of Price Information— What Happened to Container Corporation?*, 63 Va. L. Rev. 639, 661–666 (1977); Note, *Antitrust Law—Unfair Trade Practice*, 46 G.W.U. L. Rev. 113 (1977). Antitrust practitioners also have criticized the decision. See B.N.A., Trade Reg. Rep. No. 808, pp. B–1 to B–4 (April 7, 1977). See also *L.C.L. Theatres, Inc.* v. *Columbia Pic-*

In describing the facts in *Container*, this Court stated (393 U.S. at 335):

> While there was present here, as in *Cement Mfrs. Protective Assn.* v. *United States*, 268 U.S. 588, an exchange of prices to specific customers, there was absent the controlling circumstance, *viz.*, that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job.

The court of appeals here concluded (Pet App. 18a–29a) (a) that this passing reference established a "controlling circumstance" exception to the general rule that price information exchanges are unlawful if their effect is to raise or stabilize prices; and (b)

*tures Industries, Inc.*, 421 F. Supp. 1090, 1106–1107 (N.D. Tex.), appeal pending, C.A. 5, No. 76–3421.

Other courts, however, have concluded that exchanges of price information may be justified by the sellers' desire to establish a "meeting competition" defense. See *Belliston* v. *Texaco, Inc.*, 455 F. 2d 175, 181–182 (C.A. 10), certiorari denied, 408 U.S. 928; *Gray* v. *Shell Oil Co.*, 469 F. 2d 742, 746–747 (C.A. 9), certiorari denied, 412 U.S. 943. See also *Wall Products Co.* v. *National Gypsum Co.*, *supra*, 326 F. Supp. at 328. *Belliston* and *Gray* are easily distinguishable; in both of those cases there was no evidence that the price information exchange had the effect of increasing or stabilizing prices. The *Wall Products* court asserted its conclusion without supporting discussion. But, in any event, we believe that the conclusions of these cases are incorrect for the reasons discussed in the text.



that a desire to establish a meeting competition defense is a "controlling circumstance."

This passage of *Container* did not create a general "controlling circumstance" exception to the Sherman Act where none had existed before. The Court described the "controlling" circumstance of *Cement*, but *Cement*, unlike *Container* and unlike the present case, involved only exchanges of information about sales contracts closed prior to the exchange (268 U.S. at 594–597, 600) and the exchanges in *Cement* had no effect on price (*id.* at 606). The Court's reference in *Container* simply pointed out that the distinctive feature of the price information exchange in *Cement*—preventing fraud in the *execution* of long-term contracts that had been entered into before their disclosure to competitors—was not present in *Container*.[*]

Far from recognizing that the desire of sellers to protect themselves from buyers scheming to obtain lower prices in future deals was a good reason for sellers to exchange information on their open offers, the Court rejected that very argument in *Container*. The district court had held that the exchange of price information was a legitimate means of preventing cus-

[*] As the Court recognized in its most recent citations to *Cement*, the case simply does not deal with the kind of facts present here. In *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 113, it is cited for the undisputed proposition that information exchanges are not *per se* illegal; in this case the prohibited effect on prices has been shown. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781, the Court cited it as approving exchanges of information on closed transactions; this case deals with exchanges on open transactions at the moment of rivalry.

tomers from inducing lower prices by misrepresenting offers received from competitors. 273 F. Supp. 18, 59–61 (M.D. N.C.). This Court held that the effect on prices, not the reason for the price exchange, was dispositive, and it rejected the district court's contrary conclusion without the need for separate discussion.

The sellers in *Container* argued in this Court that "[f]rom *Staley* and the many cases which have followed it over the years, it is clear that sellers not only have a legal right but a duty at times to verify information as to prices which their customers claim [to] have been offered to them by competitors." [12] The sellers made, in other words, an argument remarkably like that respondents make here. This Court rejected that argument, too, without separate discussion.

The holding of *Container,* then, necessarily rejected "good motive" arguments. The Court's passing reference to the "controlling circumstance" of *Cement* therefore could not have established a broad "good motive" exception to the Sherman Act. Implied exemptions from the Sherman Act are not favored," and a passing reference to an older case is not an appropriate source for new exemptions.

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[12] Brief for the Appellees, No. 27, October Term, 1968, p. 43; footnote omitted.

[13] *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, 719–720 (collecting cases).



*2. The Sherman Act and the Robinson-Patman Act do not conflict*

Because there is no general "controlling circumstance" exception to the Sherman Act, the appropriate inquiry is whether the Robinson-Patman Act grants to sellers a privilege to engage in conduct that ordinarily would violate the Sherman Act. This is an inquiry governed by well-established principles. Repeals by implication are not favored, and courts should endeavor to reconcile the two laws rather than make one yield to the other. *United States* v. *Borden Co.,* 308 U.S. 188, 198–199; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352; *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133–136. This Court already has indicated, moreover, that the Robinson-Patman Act must be construed in harmony with "the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. of America* v. *Federal Trade Commission, supra,* 346 U.S. at 74. In the present case, however, both statutes can be enforced fully, for they are not inconsistent.

The meeting-competition defense under the Robinson-Patman Act "presupposes that the person

charged with violating the Act would, by his normal * * * pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price." *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., supra,* 324 U.S. at 754, As *Staley* holds, the defense is not a justification for a pricing system that increases rather than reduces prices. The defense is based on a recognition of the exigencies of competitive rivalry, and it is not an excuse for competitors' collaboration. It is anomalous to say that sellers are entitled to engage in a practice (price information exchanges) the effect of which is to *raise* prices, because otherwise they might be charged with selling at prices that are too low. Yet that, unless we misunderstand it, is respondents' argument.

The tension the court of appeals perceived between the Sherman Act and the Robinson-Patman Act is illusory. Although a seller may take advantage of the meeting competition defense only if it has a commercially reasonable belief that its price concession is necessary to meet an equally low price of a competitor (*Staley, supra,* 324 U.S. at 758–760), a seller may acquire this belief, and hence perfect its defense, by doing everything reasonably feasible—short of violating some other statute, such as the Sherman Act—to determine the veracity of a customer's statement that he has been offered a lower price. If, after making reasonable, lawful, inquiries, the seller cannot ascertain that the buyer is lying, the seller is entitled to make the sale. *Staley, supra; Federal Trade Commission* v. *Henry Broch & Co.,* 363 U.S. 166, 176. There is no need for a seller to discuss price with his competitors to take advantage of the meeting competition defense.[78]



This reading of the Robinson-Patman Act respects the congressional intent that it strengthen, not weaken, the Sherman Act. Well before Congress passed the Robinson-Patman Act this Court had held that exchanges of current price information among competitors raised Sherman Act problems. *American Column & Lumber Co.* v. *United States, supra; United States* v. *American Linseed Oil Co., supra.* Congress was aware that agreements to exchange competitive information might have either the purpose or the effect of fixing prices, and the legislative history of the Robinson-Patman Act expresses an unmistak-

[78] The Federal Trade Commission agrees with the Department of Justice that this is the proper interpretation of the Robinson-Patman Act. See Pet. App. 97a–99a.

No court of appeals has held that a seller must "verify" price offers with its competitor in order to take advantage of the meeting-competition defense. See *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47, 55–56 (C.A. 1), certiorari denied, 380 U.S. 906; *Kroger Co.* v. *Federal Trade Commission, supra,* 438 F. 2d at 1377; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission, supra.* The court of appeals thought that *Viviano Macaroni Co.* v. *Federal Trade Commission,* 411 F. 2d 255 (C.A. 3), required consultation with competitors (see Pet. App. 15a, 26a–28a), but it was mistaken. *Viviano,* like *Staley,* held that a seller must acquire a good faith belief that he is meeting real competition; it "requires only a reasonable inquiry into the buyer's veracity. [It] does not compel an investigation which itself is illegal either because it results in price fixing or violates [some other statute]" (Pet. App. 53a (Weis, J., dissenting)).

able design not to allow the new statute to become a vehicle for price fixing. See, *e.g.*, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); 80 Cong. Rec. 6287 (1936) (remarks of Sen. Logan).

The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) examined this legislative history and the goals of the Robinson-Patman Act. It concluded (*id.* at 182) that "the Section 2(b) [meeting competition] defense should not permit collusive price-matching among sellers, and cannot legitimize otherwise unlawful pricing conspiracies." It would defeat rather than serve as an excuse for competitors whose price exchanges raise or fix prices.

Even if the Court should disagree with our analysis to this point, it still would not follow that a seller should be permitted to discuss prices with its competitors. Even if a seller, after diligent efforts (short of discussions with competitors) cannot determine whether the buyer has correctly represented that it has been offered a lower price,[79] the Robinson-Patman Act still offers him several choices:

First, he may gamble on the buyer's veracity, cognizant that a lying buyer would be violating Section 2(f) of the Robinson-Patman Act, and that the penalties for violation of that provision may make the seller more believable.

[79] A seller need make only "reasonable and prudent" inquiries (*Staley*, *supra*, 324 U.S. at 759–760), and if, after diligent efforts to ascertain the truth, he still undercuts a competitive offer, he is not liable. *Beatrice Foods Co.*, 76 F.T.C. 719, 809–812, affirmed *sub nom. Kroger Co.* v. *Federal Trade Commission*, *supra*.



Second, he may decline to cut his price. If the buyer is lying, the decision not to cut price will not cost the sale on grounds of price.[80] And if the sale falls through because the buyer actually had been given a lower offer, it may be reasonable to believe the buyer next time. The Robinson-Patman Act never compels a seller to engage in price discrimination, and this course of action respects both Section 2(a) of the Robinson-Patman Act (the general ban on price discrimination) and the Sherman Act.

Third, the seller may make the sale at the price the buyer has requested and offer the same low price to other customers similarly situated. This, too, respects Section 2(a), and it is procompetitive because it produces a general reduction in price. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 523.

The Robinson-Patman Act's general aim, after all, is to prevent price discrimination, not to allow it to be justified. It allows discrimination only in limited circumstances, one of which is the reasonable belief on the part of the seller that he is meeting competition. If the seller cannot form such a belief, the Robinson-Patman Act not only allows but also demands that any sale not be discriminatory.

The Robinson-Patman Act no more contemplates that a seller will violate the Sherman Act in order to acquire information to show that price discrimination was lawful than that the seller will violate any other

[80] The customer might place that particular sale elsewhere, however, to carry out his bluff.

statute to acquire that information.[81] The court of appeals' decision would allow competitors to produce anticompetitive effects in the name of a good faith desire to do something that, at best, is simply "not illegal" under another statute. Its holding would have a deleterious effect on competition in oligopolistic industries, for it would afford sellers a relatively painless way to avoid the strictures of the Sherman Act.

*3. Allowing sellers to exchange price information would frustrate competition*

The court of appeals appeared to believe that exchanges of price information among competitors would be beneficial to competition. It stated that discouraging sellers from reducing their prices to meet competition would be unwise because "it is through isolated price reductions that established price levels are eroded, precipitating widespread price cuts. * * * The Government's position, then, could induce greater price rigidity" (Pet. App. 21a–22a).

The court of appeals is wrong. One commentator remarked that the court's desire to foster competition in oligopolistic markets and the result it reached are "inherently contradictory." [82] The entire underpinning for the prohibition of price information exchanges—

[81] A seller who doubts the truthfulness of a buyer's representations and desires to establish a meeting competition defense to price discrimination would not, for example, be free to burgle the buyer's office or wiretap the buyer's telephone in search of price information. There is no greater reason to allow the seller to violate the Sherman Act to obtain the information he seeks.

[82] See Note, *supra*, 90 Harv. L. Rev. at 1492.



which we have discussed at pages 73–79, *supra*—is that information exchanges help sellers to agree on prices and to enforce their agreement. Current price information exchanges facilitate price matching and thus deter sellers from offering lower prices by making it impossible for them to increase their sales by offering lower prices.

When seller *B* matches seller *A*'s price, the buyer receives no benefit: *B*'s price is the same as *A*'s. (Indeed, *B* would violate the Robinson-Patman Act by "beating" *A*'s discriminatory price.) If *A* knows that *B* will detect his price concession and match it, *A* has no reason to offer the concession, because *A* cannot increase his sales by doing so. If lower prices are routinely matched, it is in the interest of *A*, *B*, and all other sellers not to reduce prices.[83]

The court of appeals was right to think that "cheating" is an important factor in breaking down cartels and price-fixing agreements, but the exchange of price information discourages "cheating" and thus helps to enforce a price-fixing agreement. Only secret discounts effectively start the dissolution of a price-fixing agreement. See Kaysen and Turner, *supra*, at

[83] The competitively significant event is the first price reduction, not the "matching" of the reduction. If *B* verifies that *A* made the offer the buyer said he had received, *B*'s "matching" offer would not lower the price to the buyer or increase the amount of overall competition between *A* and *B*. And if *B* learns (by discussing prices with *A*) that the buyer was lying, *B* will not reduce his price, and both *A* and *B* will receive assurance that they are not competing. "Verification" thus does not lead to lower prices; only secret (or general) price reductions do so.

179–180. That is why this Court has held that many forms of price information exchange are illegal and why the court of appeals' decision would undermine the competition it sought to promote.

The record in this case illustrates the dangers discussed by the Court in *Container* and by economists in scholarly writings. The jury's verdict establishes that the exchange of price information fixed or stabilized prices (Pet. App. 10a, 12a, 52a). Eight gypsum companies with 94 percent of the gypsum board market nationwide were able during 1966–1968 to raise prices, establish identical credit terms, and reduce delivery services, despite industry over-capacity and declining demand.[84]

The defendants were aware that their exchange of current price information helped stabilize prices. They were willing to initiate price cutting only "[i]f we are successful in obtaining [more] business without it being general knowledge" (C.A. App. 864ex). As USG's vice-president Gimlin testified, his company's purpose in exchanging current price information was "[s]o we wouldn't be over-competitive on price," and the practice "help[ed] the profit picture" of his company (I A. 339–340, 375–376). Georgia-Pacific's pricing administrator stated that if it were not for these price exchanges the competitive situation "could have gotten worse" (II A. 588–589). See also

[84] In *Container*, by comparison, the 18 defendants sharing 90 percent of a regional market kept prices only within a "narrow ambit" on a "downward trend." 273 F. Supp. at 21–22; 393 U.S. at 336.



I A. 159–160 (Bear of USG); II A. 545 (Meyer of G–P); II A. 960 (Galvin of USG).

C. THE COURT OF APPEALS' LEGAL THEORY DOES NOT COVER THIS CASE

For the reasons given above, sellers' desire to establish a meeting competition defense to any charge of price discrimination does not justify an exchange of price information that produces higher or stable prices. Even if we are wrong in this, however, the judgment of the court of appeals should be reversed because its legal theory is inapplicable to this case.

The court of appeals held (Pet. App. 28a–29a) that the jury should have been told that a price information exchange is lawful, regardless of its effects on prices, if (1) it is undertaken *solely* to establish a defense to allegations of price discrimination; (2) the seller first resorts to all reasonable means of price verification other than discussing price with its competitor; (3) the seller seeking verification has a good reason to doubt the veracity of price representations made by a buyer; and (4) each price communication with a competitor concerns only one price and one buyer.

Respondents, however, never requested such an instruction. The instructions they proposed (IV A. 1856–1860) would not have asked the jury to determine whether establishing a meeting competition defense was the *sole* purpose of the exchanges, and none of the proposed instructions would have made the defense turn on turning to competitors only as a last resort. None would have made the defense turn on limiting

each communication to a single price or buyer. In other words, under the court of appeals' test the instructions respondents proposed were defective as a matter of law. They therefore are not entitled to a reversal because the district court failed to give the defective instructions they proposed. See Fed. R. Crim. P. 30; *United States* v. *Park, supra,* 421 U.S. at 676.

The defect in respondents' proposed instructions is not a matter of form. They did not propose an instruction similar to the one the court of appeals favored, because such an instruction, like the one the district court gave, would have led to a conviction. Respondents have never contended that the *sole* purpose of the price information exchange was to establish a meeting competition defense. At trial they objected to the district court's description of their position as so limited; at respondents' request, the district court told the jury that respondents were contending that they exchanged information "to avoid being defrauded" (IV A. 1764; see also IV A. 1744–1745). On appeal respondents stated that the defense of exchanging information to avoid consumer fraud—a defense rejected by this Court in *Container*—was a "central element of the defense."[85] The charge that the court of appeals thought to be correct would have been inconsistent with respondents' defense, and the district court's failure to give such a charge therefore is not reversible error.

[85] Appellants' Joint Br. 58.



Finally the instruction that the court of appeals thought was preferable would not have had a basis in the evidence. As the statement of facts at pages 13–15, *supra,* indicates, many of the sellers' employees, and at least one respondent personally, conceded that they had multiple motives in exchanging price information. The exchanges covered large numbers of prices simultaneously. Price information was exchanged even during 1965 to 1968, when respondents were not meeting the competition from single-plant producers or granting discounts from their published prices; none of the exchanges during this period could have been for the sole purpose of establishing a meeting competition defense. Whatever the theoretical merits of the court of appeals' approach to price information exchanges, that approach does not assist respondents and there was no need for the district court to incorporate it in its charge.

## II

### THE OTHER INSTRUCTIONS TO THE JURY WERE CORRECT

The antitrust issues we have discussed above are the centerpiece of this case. Nevertheless, because two different judges of the court of appeals advanced additional reasons to hold a second trial, a reversal by this Court of the antitrust issue alone would make a second trial inevitable.

The first trial was complex, consuming 19 weeks and producing great volumes of testimony and exhibits. The United States prevailed in the court of appeals on

all of the issues except the antitrust issue, and only the fact that Judges Hunter and Adams found separate grounds for reversal (although each disagreed with the other's arguments) gives rise to the need for further proceedings. We urge this Court to adopt the position of the majority of the court of appeals on each of the subsidiary issues here, so that this case may be brought to a close without the necessity of another protracted trial.[56]

"'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown* v. *United States*, 411 U.S. 223, 231–232, quoting from *Lutwak* v. *United States*, 344 U.S. 604, 619. A defendant is not entitled to the "best" jury instructions or to those he prefers, so long as those actually given are adequate. The instructions must be read as a whole, and, if as a whole they contain "an adequate statement of the law to guide the jury's determination" (*United States* v. *Park*, 421 U.S. 658, 675), the verdict should be upheld even if better instructions could have been given.[57] Read as a whole, the district court's instructions in this case informed the jury of the proper legal standards and did not coerce it to reach a verdict.

[56] Other arguments may be open in the court of appeals on remand from this Court (see note 68, *supra*).

[57] See also, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 152 and n. 10; *Cupp* v. *Naughten*, 414 U.S. 141, 146–147; *Holland* v. *United States*, 348 U.S. 121, 140; *United States* v. *Bayer*, 331 U.S. 532, 536–537; *Boyd* v. *United States*, 271 U.S. 104, 107. Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637.



A. THE INSTRUCTIONS CONCERNING PARTICIPATION IN THE CONSPIRACY

Judge Hunter, writing only for himself, concluded that respondents "were entitled to a more precise charge on the purpose and scope of the conspiracy any particular defendant was alleged to have joined" (Pet. App. 29a). He stated that "it was necessary specifically to inform the jury that any particular defendant could be found guilty of conspiracy only if he understood that he had joined the single, overall agreement charged in the indictment; participation in any of the subsidiary events was not enough" (*id.* at 30a).

We have reproduced at pages 50–52, *supra*, many of the instructions to the jury concerning the evidence necessary to establish that any defendant joined the overall conspiracy. These instructions unequivocally told the jury that the indictment charged only one conspiracy, and that, in order to convict any defendant, the jury must find that he or it, by his or its own actions, knowingly joined that single conspiracy. As Judge Weis argued (Pet. App. 56a–60a), these instructions were more than sufficient.

Judge Hunter apparently believed that the district court should have given a two-edged instruction: in addition to the instruction (which the court gave) that the jury could convict only if it found that the defendant joined the overall conspiracy, Judge Hunter argued that the court should have instructed that a defendant who joined a subsidiary component

without intending to join the conspiracy charged in the indictment was not guilty of the crime charged. But these are simply two ways of stating the same thing, and "it is unrealistic to believe that the lack of a semantic refinement in a lengthy and otherwise adequate charge had any effect whatsoever on the verdict" (Pet. App. 60a).[48]

Judge Hunter relied on *United States* v. *Borelli*, 336 F. 2d 376 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960. But *Borelli* was a unique case.[49] It involved a narcotics business with shifting operations; its personnel were unknown to each other and its activities did not depend on the cooperation of all its members. The court of appeals found that the existence of multiple conspiracies leapt from the record, and that "inclusion of

[48] Moreover, the instruction respondents proposed, and to which Judge Hunter referred (Pet. App. 34a n. 13), is not significantly different from the district court's charge. Respondents proposed that the district court tell the jury that "it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant." But the court's charge told the jury that. Even respondents' proposed charge did not meet Judge Hunter's requirement that the instructions "*emphasize* that joining a subsidiary agreement would not constitute guilt unless it was done with intent to join the overall conspiracy" (Pet. App. 32a; emphasis added). Respondents are not entitled to attack the instructions for failure to contain an explicit statement to that effect when they did not request the inclusion of such a statement. Fed. R. Crim. P. 30.

[49] The Second Circuit has quite properly limited *Borelli* to its facts. *United States* v. *Salazar*, 485 F. 2d 1272, 1277 n. 9 (C.A. 2), certiorari denied, 415 U.S. 985; *United States* v. *Guanti*, 421 F. 2d 792, 800–801 (C.A. 2), certiorari denied, 400 U.S. 832.



all the [defendants] in a single conspiracy * * * [was] something of a *tour de force*" (336 F. 2d at 380).

In the present case, by contrast, the success of any price-fixing venture depended on the participation of all respondents; if any major producer had withdrawn, price maintenance would have been impossible. There was either one overall agreement or none, and the subsidiary episodes of price-fixing, although independently unlawful, were simply manifestations of the conspiracy in action. They could not have taken place without an umbrella agreement or understanding.

The instructions given here would have been adequate even if a subsidiary conspiracy could have had an independent existence. But given the nature of the proof, this case is quite unlike *Borelli*, and the instructions are not open to reasonable challenge. *Blumenthal* v. *United States*, 332 U.S. 539; see also *United States* v. *Abraham*, 541 F. 2d 1234, 1238–1239 (C.A. 7), certiorari denied, 429 U.S. 1102.

### B. THE INSTRUCTIONS CONCERNING WITHDRAWAL

The conspiracy charged in this case was formed in the 1960's (and perhaps earlier) and was most effective from 1965 to 1968. Because the defendants were not indicted until late 1973, it was inevitable that a question would arise whether the conspiracy continued within the five-year period of limitations.

The district court charged the jury that it could convict only if it found that the conspiracy continued

and that at least one overt act was committed within the five years preceding the indictment, but that, if it so continued, all of its members would be responsible even if the last overt act of any particular member occurred more than five years before the indictment (see pages 57–58, *supra*). This was a correct statement of the law (see *Hyde* v. *United States*, 225 U.S. 347, 369–370), and the jury's verdict establishes that the conspiracy continued at least into 1969.

The defendants argued, however, that they had withdrawn from the conspiracy before December 27, 1968, the critical date for limitations purposes. Because any person's responsibility for further conspiratorial acts ceases on his withdrawal, it became important for the court to define for the jury what a conspirator must do to withdraw from the venture.

A conspirator may withdraw by notifying law enforcement officials of the conspiracy. *Fiswick* v. *United States*, 329 U.S. 211, 217. He also may withdraw by taking "affirmative action" of some sort. *Hyde* v. *United States*, *supra*, 225 U.S. at 369. As the Court explained (*id.* at 369–370):

> Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until [the conspirator] does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. * * * As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.



Respondents argued to the jury that they withdrew from the conspiracy prior to December 27, 1968, by resuming competitive pricing. The district court allowed them to make that argument, but it refused to incorporate the argument in its instructions because, among other things, it had been disputed whether the major producers were competing against each other or only against the single-plant producers (IV A. 1648). The court told the jury that, in order to conclude that a defendant withdrew from the conspiracy, it must find that he "took some affirmative action to disavow or defeat its purpose" (IV A. 1732). The charge employed the language of *Hyde*.

Judge Hunter concluded that the district court erred because, after charging in the language of *Hyde*, it went on to restate that withdrawal involved either affirmative notification of the other conspirators or notification of law enforcement agencies. Judge Hunter thought that this implicitly eliminated as possible methods of withdrawal other forms of "affirmative action to disavow or defeat" the conspiracy's purpose. But it hardly is likely that the jury would think that the third sentence of the instruction (see page 58, *supra*) took away the generality of the first sentence, particularly when the court had allowed respondents to argue that their resumption of competitive pricing was "affirmative action to disavow or defeat" the conspiracy. Respondents apparently did not understand the third sentence to limit the first, for they did not object on that ground. They argued only that the court should have clarified the instruction by pointing out that a resumption of com-

petition could be sufficient "affirmative action," and even the instruction they proposed to that end was defective."[90]

A defendant has the right to a correct instruction, but he cannot insist on the use of particular language. *Sugarman* v. *United States*, 249 U.S. 182, 185. The instruction in this case was adequate because it generally told the jury that conspirators could withdraw by taking action to "disavow or defeat" the conspiracy. That encompassed respondents' theory of withdrawal by competition, and Judge Weis therefore correctly concluded that the charge was adequate (Pet. App. 60a–63a).

C. THE INSTRUCTIONS ON REACHING A VERDICT

We have set out fully at pages 59–61, *supra*, the instructions the court gave to the jury concerning the

[90] Judge Hunter believed that the district court should have given respondents' proposed charge, which would have told the jury that a conspirator must take "affirmative action" to withdraw and that "[r]esumption of competitive behavior, such as intensified pricecutting or price wars, *could* constitute such affirmative action" (Pet. App. 38a n. 15; emphasis added by Judge Hunter; see also IV A. 1856). Judge Hunter recognized that this was "not a model charge on this point" (Pet. App. 38a n. 15). That is an understatement. The charge would have been misleading, because it did not make the crucial distinction between competition against single-plant producers (which was clearly resumed early in 1968) and competition among major producers (which may or may not have been resumed). Withdrawal would not be complete until a producer was competing fully against all other producers, including its former co-conspirators. Respondents were not entitled to an instruction that would have told the jury that it could acquit simply because the major producers resumed competition against the single-plant producers but not against each other. Because respondents' proposed instruction could have been so interpreted, the court properly declined to give it.



proper way of deliberating to reach a verdict. The court told the jurors that they should deliberate conscientiously, that each juror should be willing to reexamine his or her own position, and that no juror should surrender a conscientiously held position.

After the jury had been deliberating for six days, the foreman of the jury asked to speak privately with the judge. Respondents and their attorneys consented. The discussion centered about the physical and emotional condition of some of the jurors, and the foreman asked the judge to consider these matters (see generally IV A. 1837–1840). The conversation concluded (IV A. 1840):

> THE COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.
>
> MR. RUSSELL [the foreman]. I appreciate it. It is a situation I don't know how to help you get what you are after.
>
> THE COURT. Oh, I am not after anything.
>
> MR. RUSSELL. You are after a verdict one way or the other.
>
> THE COURT. Which way it goes doesn't make any difference to me.
>
> * * * * *
>
> THE COURT. Thank you. You tell them to keep deliberating and see if they can come to a verdict.

The jury returned a verdict the next day.

Judge Adams alone concluded that this exchange coerced the jury into reaching a verdict (Pet. App.

40a–50a). He believed that the district court failed to discharge an "affirmative obligation to make it clear to the foreman that the jury had the option of reaching no verdict, should juror unanimity prove impossible" (*id.* at 46a).

The determination whether a judge's remarks have coerced a jury must be made "in * * * context and under all the circumstances." *Jenkins* v. *United States*, 380 U.S. 445, 446. As Judge Weis persuasively argued (Pet. App. 63a–69a), the conclusion that the jury was coerced to reach a verdict is strained. In this case the district court told the jury three times that no juror should abandon his or her conscientious position just for the purpose of reaching a verdict (IV A. 1767, 1815, 1818).[91]

Nothing in the meeting with the foreman detracted from the force of this repeated instruction. The court did not say that any juror should disregard his or her beliefs; it did not say that the jury was required to reach a verdict. Even the instruction to continue deliberating was conditional: the court told the foreman that the jury should continue deliberating "[f]or

[91] The district court did not give a charge based on *Allen* v. *United States*, 164 U.S. 492, because the court of appeals has forbidden the use of such a charge. See *United States* v. *Fioravanti*, 412 F. 2d 407, 414–420 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837. This case therefore does not require consideration of the propriety of the *Allen* charge. Even in the courts of appeals that have placed some restriction on the use of *Allen* charges, moreover, the effect of the charge must be assessed in the context of the other instructions to the jury. See, *e.g.*, *United States* v. *Robinson*, 560 F. 2d 507, 516–518 (C.A. 2) (*en banc*) (the giving of two *Allen* charges within a brief time held not coercive in light of all the circumstances).



the time being" (IV A. 1839), and the court's parting words asked the jury to "see if they can come to a verdict" (IV A. 1840).

The district court explicitly told the foreman that the jury should continue deliberating. He doubtless gave the foreman the impression that he would prefer a verdict to a mistrial, although he did not say so directly. There was nothing wrong with either the statement or the implication. The jury had deliberated only six days after a 19-week trial, and there was no need to declare a mistrial simply because it had not yet reached a verdict. If there was no need to declare a mistrial, it necessarily follows that the district court could explicitly tell the jury to keep deliberating.

The implication that a verdict is preferable to a mistrial is inherent in the instruction to keep deliberating. If the court were truly indifferent between a verdict and a deadlock, it would not tell the jury to keep deliberating. There is nothing wrong, therefore, in leaving the jury with an "impression" that is obvious even to the naive—that a verdict would be preferable to a deadlock.

The question that must be resolved when a claim has been made that the jury was "coerced" to reach a verdict, then, is not whether the jury might think that the court would like it to decide the case. The proper question is whether the court attempted to induce the jury to reach that verdict in an improper way. It would be "coercion" for a judge to attempt to negate the prosecutor's burden to establish guilty beyond a reasonable doubt, or for a judge to induce a juror to yield to the majority and to surrender his or her own

beliefs so that unanimity may be achieved. But the district court did not say anything remotely resembling these examples.

Judge Adams concentrated on one statement: when the foreman said that the judge was "after a verdict," the judge replied that "[w]hich way it goes doesn't make any difference to me." This reply is ambiguous: "which way *it* goes" may refer to the difference between conviction and acquittal but it may as easily be understood to refer to the difference between a unanimous verdict and a deadlock. But however the statement may be read it is no more "coercive" than a bald statement that, other things being equal, the court would prefer a verdict to a mistrial. For the reasons we have discussed above such a statement would not be coercive, and it is quite harmless where, as here, the court instructed the jury three times that no juror should surrender a conscientious opinion merely for the purpose of reaching a verdict.[92] The

[92] Many cases have found no coercion in instructions that are markedly less reserved than those of the district court in the present case. See, *e.g.*, *Government of Canal Zone* v. *Fears*, 528 F. 2d 641, 643 nn. 1 and 2 (C.A. 5) ("[L]et me insist that you do everything possible in your power to come to an agreement. * * * You can come to a decision. * * * [I]t's the duty of citizenship, not only to sit as a juror but to decide the case is most important."); *United States* v. *Bowles*, 428 F. 2d 592, 595–596 (C.A. 2), certiorari denied, 400 U.S. 928 ("[Y]ou should come to some conclusion. * * * I don't indicate by that that I want you to bring in a verdict of guilty or innocent, either one * * * but I think you should be able to arrive at a verdict."); *United States* v. *Tolbert*, 406 F. 2d 81, 86 (C.A. 7) ("If you should fail to agree on a verdict, the case must be retried."); *Benscoter* v. *United States*, 376 F. 2d 49, 51 (C.A. 10) ("[T]his is not a difficult case for you to decide, and this jury ought to reach a verdict in this case."). See *United States*



district court was scrupulously careful to avoid misleading, influencing, or coercing the jury,[93] and the conversation with the foreman is not a reason to overturn the jury's verdict.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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v. *Dyba*, 554 F. 2d 417, 420–421 (C.A. 10), certiorari denied, October 3, 1977 (No. 76–1731).

[93] In addition to the careful instructions set out at pages 59–61, *supra*, the court also told the jury (IV A. 1703) that "I am neutral in this case. * * * [I]f I had an opinion as to the innocence or guilt of these defendants, I would be permitted to tell you what it was. * * * I am not going to do it. * * * So, if I am not going to do it—if I could do it directly and [I] am not going to do it, I am not going to do it indirectly * * *. If from anything I say * * * you think I had such an opinion, you shouldn't be concerned with it at all. Any opinion I have isn't important as to the facts."

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FOR ARGUMENT

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977.

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**No. 76-1560**

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UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

UNITED STATES GYPSUM COMPANY, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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* Although Jay P. Nicely concurs in the position of all Respondents that numerous reversible errors occurred during trial, he has not sought review of his conviction on any grounds other than sufficiency of the evidence, and thus has not sought the alternative relief of a new trial. Rather, Mr. Nicely sought only acquittal on the grounds of insufficient evidence. His appeal was not dealt with by the Court of Appeals, and is the subject of a separate Petition for Writ of Certiorari to this Court (No. 76-1556). See Supplemental Brief of Colon Brown and J. P. Nicely

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## Explanation Of Citations

| Citation | Explanation |
|---|---|
| __A.__ | Supreme Court Appendix (preceded by volume number and followed by page number(s)). |
| App.Jt.Br.__ | Appellants' Joint Brief in the United States Court of Appeals for the Third Circuit, Nos. 75-1836 through 75-1842, which has been reproduced as an Appendix to Respondents' Joint Brief. |
| App.Jt.Rep.Br.__ | Appellants' Joint Reply Brief in the United States Court of Appeals for the Third Circuit, Nos. 75-1836 through 75-1842, which has been reproduced as an Appendix to Respondents' Joint Brief. |
| C.A.App.__ | Appendix in the United States Court of Appeals for the Third Circuit, Nos. 75-1836 through 75-1842, which has been filed with this Court. |
| Def.Exh. (USG) [(NG), (G-P), (Cel)]__ | Defendants' Trial Exhibit introduced by United States Gypsum Company [or National Gypsum Company; Georgia Pacific Corporation, or The Celotex Corporation] |
| Def.Req.Final Instr. __ | Defendants' Request for Final Jury Instructions (printed at IV A. 1841-81). |
| Def.Supp.Req.__ | Defendants' Supplemental Requests for Jury Instructions (printed at IV A. 1908-17). |
| Ev.H.DX__ | Defendants' Evidentiary Hearing Exhibits. |
| Ev.H.Tr.__ | Transcript of the evidentiary hearing in United States v. United States Gypsum Co., et al., No. 73-347, in the United States District Court for the Western District of Pennsylvania. |
| Gov.Br.__ | Brief for the United States in this No. 75-1560. |
| Gov.Exh.__ | Government's Trial Exhibits. |
| Gov.Req.__ | Government's Request to Charge (printed in part at IV A. 1882-89). |
| Pet.App.__ | Appendices A through E to the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit filed by Petitioner United States of America in this No. 76-1560. |
| Tr.__ | Transcript of the trial proceedings in United States v. United States Gypsum Co., et al., No. 73-347, in the United States District Court for the Western District of Pennsylvania. |
| Watt.Supp.Req.__ | Defendant Andrew J. Watt's Supplemental Requests for Jury Instructions (printed at IV A. 1893-94). |

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether verification with a competitor of a customer's claim of a more favorable price offer violated the Sherman Act where the purpose of such verification was to comply with the Robinson-Patman Act or to prevent customer fraud.

2. Whether, when the Government placed in issue respondents' purpose for verification, the trial court erred in instructing the jury in this criminal case to ignore respondents' actual purpose and to "presume as a matter of law" that respondents' purpose was unlawful if verification had a stabilizing effect on prices.

3. Whether, if this Court eliminates the element of unlawful purpose or otherwise expands the scope of Sherman Act liability for information exchanges, due process of law prohibits such a new rule from being applied retroactively to respondents in this criminal case.

4. Whether, when convictions could be based on vicarious responsibility for the acts of others, the trial court erred in refusing to instruct the jury on the need to determine each respondent's understanding of the "scope and purpose" of any conspiracy which that respondent allegedly joined.

5. Whether the trial court erred in refusing to permit the jury to consider vigorous price competition and other affirmative acts inconsistent with adherence to the alleged conspiracy as proof of withdrawal from or abandonment of any such conspiracy.

6. Whether the trial court's repeated use of "dynamite" charges, its instruction of the jury foreman in a private conference from which respondents were excluded, and its insistence on a verdict "one way or the other" from an ill, exhausted, and "hopelessly deadlocked" jury, coerced the verdicts and deprived respondents of a fair trial.

## COUNTERSTATEMENT OF THE CASE

The Court of Appeals reversed respondents' convictions under Section 1 of the Sherman Act, 15 U.S.C. §1 (1973), and remanded for a new trial. Judges Hunter and Adams joined in ordering reversal because the trial court refused to permit the jury to consider respondents' lawful purpose to comply with the Robinson-Patman Act in determining whether their limited exchanges of competitive information violated the Sherman Act (Pet. App. 12a-29a; 550 F.2d at 120-27). Judge Hunter also believed that the trial judge's incorrect instructions on key aspects of conspiracy law constituted additional grounds for reversal (Pet. App. 29a-39a; 550 F.2d at 127-30). Judge Adams reinforced the judgment of reversal in a concurring opinion which detailed the facts supporting his conclusion that the trial court coerced verdicts from a deadlocked jury by conveying to the jury foreman, in a private meeting held on the seventh day of sequestered deliberations, the clear impression that the court wanted a verdict "one way or the other" (Pet. App. 40a-49a; 550 F.2d at 130-34).

Because of its disposition of the case, the Court of Appeals did not find it necessary to consider other errors which also entitled respondents to a new trial.[1] Since the Government agrees that these issues remain open for consideration by the Court of Appeals,[2] this brief confines itself to only those issues raised in the Government's petition.

[1] These included prosecutorial misconduct, additional instructional errors relating to the difference between a single and multiple conspiracies and to the relevance of legal advice, numerous prejudicial errors in evidentiary rulings, and the trial court's bias in favor of the prosecution. These issues are set forth in the Appendix to this brief. Some respondents raised additional arguments separately.

[2] Gov. Br. 72-73 n.68. Respondents therefore reserve their right to assert all of the other trial errors in the Court of Appeals.



The Government's "Statement of the Case" presents an incomplete and wholly one-sided view of the evidence which in certain material respects misstates the record.[3] Were the Court presented with a question as to the sufficiency of the evidence, the Government's tactic of omitting considerable evidence favorable to respondents might be excused. However, the issue before this Court is whether, in a vigorously contested criminal case which the jury had great difficulty deciding, respondents were denied a fair trial because of numerous instructional errors and the coercion of a deadlocked jury to reach a verdict.[4] The Court must therefore determine whether there was any evidence to support the factual and legal defenses presented during trial by respondents, but which the jury was precluded from considering by the trial court's instructions. *See Tatum* v. *United States*, 190 F.2d 612, 617 (D.C. Cir. 1951); *United States* v. *Young*, 464 F.2d 160, 164 (5th Cir. 1972); see also *infra*, n.59. Respondents' Counterstatement of the Case summarizes the evidence relevant to the instructional errors found by the Court of Appeals and raised in the Government's petition.

### A. The Disjointed and Stale Nature of the Government's Evidence

The evidence by which the Government attempted to prove a unitary conspiracy spanning more than thirteen years

[3] A more complete discussion of the record facts in this case can be found in Appellants' Joint Brief (3rd Cir.), pp. 7-21 and 38-46, and in Appellants' Joint Reply Brief (3rd Cir.), pp. 18-32, both of which have been reproduced in the Appendix to this brief. This discussion corrects distortions and misstatements in the Government's Statement of the Case; e.g., *compare* the Government's claim that USG received legal advice that verification was unlawful (Gov. Br. 13) *with* App. Jt. Br. 39, 159 n.144; *compare* the Government's claim of continuing uniform credit terms (Gov. Br. 35, 48) *with* App. Jt. Br. 94, including n.89; see also *infra*, 6.

[4] Thus, *Glasser* v. *United States*, 315 U.S. 60 (1942), upon which the Government relies (Gov. Br. 4), does not apply here. In that case the sufficiency of the evidence was at issue, not the adequacy of the trial court's instructions.

was circumstantial and fragmented. Unlike other Sherman Act criminal prosecutions, no witness in this case testified that he had ever agreed with a competitor on prices, terms or conditions of sale, or that he had participated in or even overheard discussions where any such agreement had been made. Instead, as Judge Hunter described the case, the Government "introduced masses of evidence concerning a multitude of seemingly unrelated events and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing conditions of gypsum wallboard. Most of this evidence dealt with actions prior to the start of the applicable limitations period" (Pet. App. 29a-30a, 550 F.2d at 127).

The Government's brief confirms Judge Hunter's statement. By far the largest portion of the Government's "Statement of the Case" pertains to what the Government itself describes as "*subsidiary* agreements" (Gov. Br. 20-35, emphasis added). Moreover, the stale nature of the Government's case is also apparent. Of the ten sections consisting of 44 pages which the Government devotes to the evidence (Gov. Br. 6-49), only one section consisting of slightly over one page is devoted to alleged conduct within the statutory period (Gov. Br. 48-49), which began December 27, 1968.[5]

The economic evidence introduced by respondents ultimately proved the irrelevance of the pre-statutory events upon which the Government relied so heavily. Respondents' evidence showed that a nationwide "price war" broke out more than a year before the statutory period began and that vigorous price competition continued throughout it. The competitive activity which existed in this period was described in the record as "intense," "very volatile," "vicious and cut throat" and as a "blood bath."[6]

[5] The statute of limitations for criminal actions under the Sherman Act is five years, 18 U.S.C. § 3282 (1970). Since the indictment was returned on December 27, 1973 (I A. 1), the statutory period began on December 27, 1968.

[6] II A. 989; III A. 1210; I A. 530. *See also*, II A. 973; III A. 1173.



## B. Vigorous Price Competition Before and During the Statutory Period

The economic evidence offered by respondents in this proceeding has never been contradicted by the Government.[7] Respondents introduced economic studies and contemporaneous marketing reports describing increased competitive discounting and deterioration of prices throughout the gypsum industry beginning as early as 1967.[8] For example, contemporaneous market reports showed chaotic conditions in 1968, the year prior to the beginning of the statutory period.[9] Substantial market price decreases followed in 1969 and 1970. In many areas nearly all ½" wallboard sold during this period was sold at a discount from list price.[10] The net result of this price deterioration was that market prices in 1970 were more than

[7] The prosecution's economic expert, Dr. Richard A. Miller, testified twice. On neither occasion did he offer an opinion on whether there was any conspiracy or behavior indicating collusion, or provide any analysis of economic data from which he felt a conspiracy could be inferred. Moreover, Dr. Miller did not dispute the data or conclusions of Dr. Richard Cyert, respondents' economic expert, discussed *infra*, 9-11 (Tr. 7144-221; 7243-50; 13,460-70; 13,472-569; 13,576-709; 13,713-31). The Government also did not contest respondents' economic evidence in the Court of Appeals.

[8] V A. 2721-23; Def. Exh. (USG) 301-02; V A. 2901; Def. Exh. (NG) 350. Price competition grew to the point that in 1969 USG authorized more than 18,000 price cuts to meet competition, while National authorized more than 17,000 such price cuts *(Id.)*.

[9] V A. 2691-93, 2709-11, 2814-20; VI A. 3065-69, 3080-84; Def. Exh. (NG) 31-34. Indeed, in October, 1968, so much discounting was occurring in the market that contemporaneous USG documents showed that if all the business then being quoted at discount prices were secured, the volume of board sold by USG at off-list prices would equal 134% of its entire 1967 sales volume (II A. 897; V A. 2711).

[10] V A. 2901-20; Def. Exh. (USG) 1104-43; VI A. 2966-86; Def. Exh. (Cel) 1142-49; VI A. 3324-28, 3403-59. Other exhibits showed that, during the period from September, 1968, through the summer of 1970, G-P's average market prices for ½" wallboard were substantially below its published list prices (VI A. 3007-11), establishing that transaction prices bore no fixed relationship to published prices (III A. 1324-27).

20% below the pre-statutory 1968 levels and almost 30% below the average prices in 1961.[11]

The Government misstates the record in claiming that this widespread competition was due only to the pricing activities of single plant producers (Gov. Br. 31). The unrebutted contemporaneous evidence proved that the respondents were waging a price war in all parts of the country against each other and not just against single-plant producers.[12]

A number of market factors, not just competition from single-plant producers, caused the deterioration in actual prices during the late 1960's and 1970. Demand fell off sharply due to a recession in the housing market.[13] The supply of gypsum board had significantly increased with the entry during the early 1960's of many additional producers.[14] Finally, respondent G-P, which entered the industry in 1965 by acquiring Bestwall Gypsum Company, introduced a completely new and

[11] V A. 2728, 2897. Average wallboard prices improved moderately in 1971 through 1973 when the economy improved, inflationary forces were strong, and federal price controls requiring prior approval of price increases were in effect. Even then, the average wallboard realized price in 1973 was 10% below the 1968 pre-statutory period level (V A. 2728, 2748, 2897; C.A. App. 2149 ex).

[12] For example, in 1968, USG made 8,165 price reductions to meet the competition of multi-plant producers, and only 926 such reductions to meet the competition of single-plant producers (V A. 2723; Def. Exh. (USG) 302). In the case of National, there were 1,065 price cuts to meet multi-plant producers and only 165 price cuts to meet single-plant producers in 1968 (V A. 2901; Def. Exh. (NG) 349). Georgia Pacific was cutting prices generally in 1968 (VI A. 3101, 3115, 3099). Similarly, the overwhelming proportion of Celotex' price reductions early in the statutory period were made to meet the competition of multi-plant producers (VI A. 3306-07). *See also, e.g.*, V A. 2691-93; VI A. 3065-74, 3153, 3167-68, 3173, 3187; Def. Exh. (NG) 31, 34. Additional evidence disproving the Government's assertion about single-plant producers is discussed in App. Jt. Rep. Br., pp. 23-25.

[13] II A. 975-76; III A. 1393. Demand in the gypsum industry is largely a function of demand in the housing and construction market (II A. 1016-17).

[14] IV A. 2249; Def. Exh. (USG) 71, pp. 1-2, part two.



very effective marketing concept by giving its local distribution managers pricing autonomy.[15] This localized marketing concept allowed G-P to bypass the traditional "middleman" and to flexibly cut prices to gain additional gypsum business.[16] As a result, the prosecution stipulated that, by 1968, G-P had embarked on a "very strong campaign to increase their share of the market," and the Government's own witnesses and G-P's competitors testified that G-P made it "very, very rough" on even the larger producers.[17]

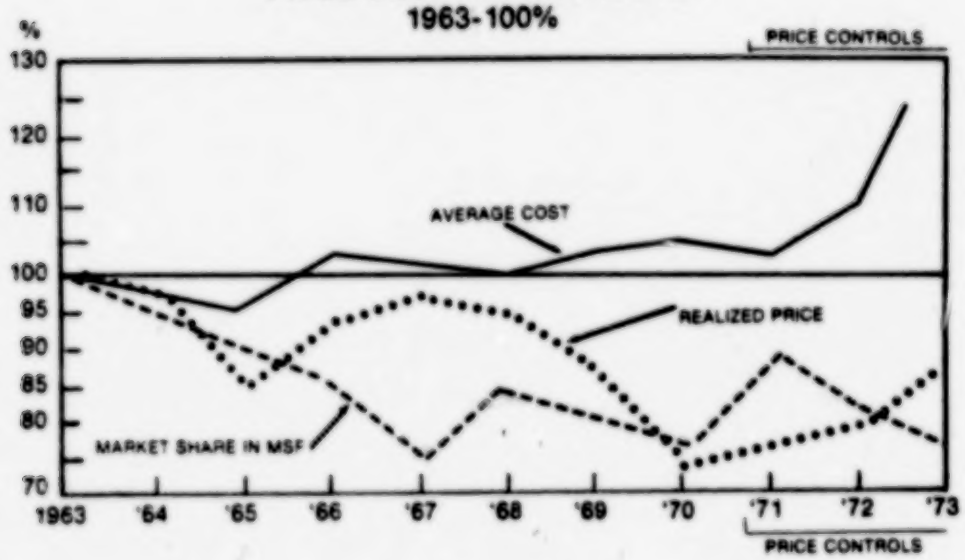
[15] I A. 465-66, 468; III A. 1140-42, 1146-48, 1150-52, 1161-62, 1213-14, 1229-30, 1207-08, 1211.

[16] The success of this marketing technique was immediately apparent as USG lost 9 percentage points of its total market share in October, 1967, while G-P gained 8.6 percentage points (II A. 893, 899-900; V A. 2670-82; VI A. 3001). By 1968, USG had begun to plan its own distribution network to compete directly with G-P distribution centers (II A. 915-16, 919-20, 984-85; III A. 1173-74, 1392-93). Later, USG also designed an interim "war zone" program, by which it lowered its published prices to all customers around each G-P distribution center (II A. 977-79; V A. 2738).

[17] I A. 454; II A. 974. Rhyne Simpson of Republic Gypsum, a Government witness, described G-P as "very definitely" a price cutter (C.A. App. 833a). Weidman and Baldwin of USG testified that G-P was by far the most aggressive competitor (II A. 972, 899). Kroth of National, another Government witness, testified that throughout the 1960's G-P, on a nationwide basis, gave National the most trouble (II A. 675-76). Hayes of National testified that G-P's competition came from all directions and was full-scale warfare (II A. 1046). Johns-Manville described G-P as its "worst competitor" (Def. Exh. (G-P) 1141).

Two additional economic facts make the decline in gypsum prices during the 1967-70 period even more significant. First, the price decline occurred during a period of highly inflated cost increases and, secondly, it occurred during a period when market prices of other construction materials increased significantly.[18] The following exhibits are typical of the trends affecting each producer (V A. 2743, 2898):

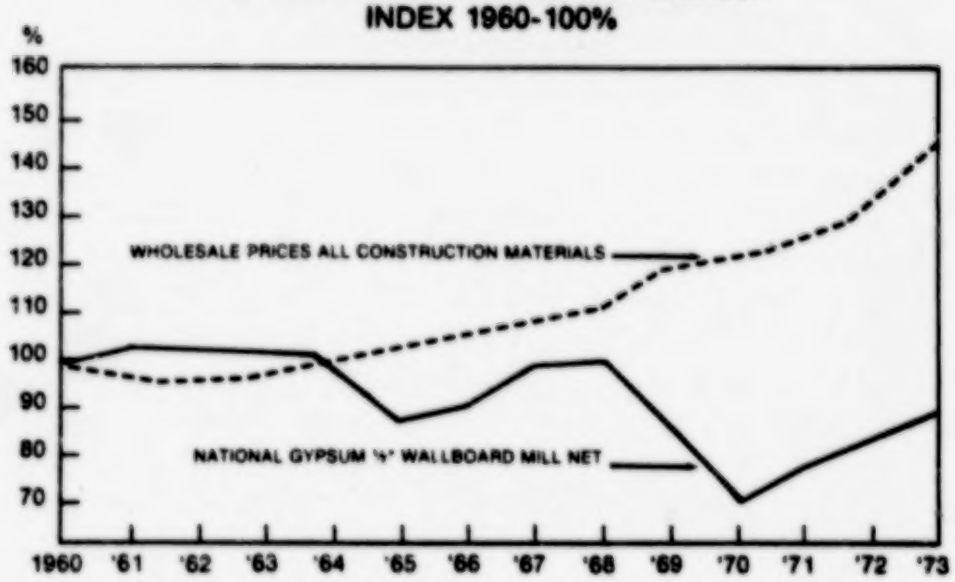
USG ½" WALLBOARD
PRICE-COST-MARKET SHARE
1963-100%




[18] The uncontested evidence showed that while average prices of food, apparel, and non-gypsum construction products rose sharply by 52% to 83%, the industry average for ½" gypsum board fell over 16% (III A. 1405-06; V A. 2748).



NATIONAL GYPSUM COMPANY
½" WALLBOARD MILL NETS
COMPARED TO WHOLESALE PRICES
OF ALL CONSTRUCTION MATERIALS.
INDEX 1960-100%




In addition to the foregoing contemporaneous economic evidence, Dr. Richard Cyert, a distinguished economist and President of Carnegie-Mellon University, studied the gypsum industry independently and reached the conclusion that throughout the statutory period and immediately before it, respondents had been engaged in "rampant price competition" that was completely inconsistent with any claimed conspiracy. The entire period was characterized by Dr. Cyert as one reflecting in the markets he studied "a high degree of competition" that "verges on being disorderly" where the picture

was one of "firms really scrambling, almost on a sale-by-sale basis to try to quote a price that is going to get that particular sale."[19]

Dr. Cyert based his conclusion on several detailed studies of ½" wallboard which is acknowledged to be the industry's bellwether product (I A. 194; II A. 940, 941, 994). These studies, designed by Dr. Cyert independently, encompassed transaction prices and discounts in metropolitan areas which he selected, a review of all sales by three respondents in fifty marketing areas throughout the country, and an analysis of sales to nine large common customers of the respondent corporations.[20] Dr. Cyert's studies disclosed extreme disparity among respondents in the actual prices charged for wallboard during the same time periods and in the same areas. In addition to wide-ranging differences in actual prices, he found widely varying discounts from list prices. Price and discount disparities existed not only between different respondents, but also in the varying prices charged by the same company during the same time period in the same area. Very substantial quantities of wallboard were sold at prices far below list, *i.e.*, at higher discounts, in each marketing area. Frequently, nearly *all* wallboard sold in an area during the three month periods studied was sold at a discount from published list prices.[21]

In summary, Dr. Cyert's unrebutted economic studies were fully consistent with the contemporaneous evidence. All of this uncontradicted economic evidence showed vigorous nationwide

[19] III A. 1315, 1318-19, 1327-28.

[20] III A. 1308-14, 1328-31, 1334-39.

[21] III A. 1314-15, 1318-19, 1328-29, 1324-26, 1321-22. Dr. Cyert reinforced his conclusion that the gypsum industry was highly competitive throughout the statutory period by studying several other economic indicators. For example, he found: (1) constant changes in market share position among the companies in the fifty market areas he studied; (2) customers' frequent changing of suppliers; (3) frequent changes in published list prices; and (4) widely varied marketing and distribution techniques among respondents (III A. 1329-35; VI A. 3435-59; III A. 1337-42; VI A. 3461-77; III A. 1342-48).



competition and unstable prices throughout the statutory period.

### C. Respondents' Lawful Purposes For Verification And The Cessation Of Verification Among The Largest Producers Prior To The Statutory Period

In addition to the economic evidence of price competition in the statutory period, another important category of evidence regarding the statutory period demonstrated that the largest gypsum producers had stopped "verifying" with one another. Until mid-1968, each corporate respondent and other gypsum producers on occasion had sought to "verify" with each other the truthfulness of a customer's claim of a competitive offer of a more favorable price, term, or other condition of sale. In the absence of sufficient data confirming the customer's claim, direct verification with competitors was regarded as legally important before extending a discriminatorily low price to the customer. Such verification was undertaken to avoid violations of the Robinson-Patman Act by satisfying its stringent requirements for establishing a good faith meeting competition defense. *See* 15 U.S.C. § 13 (1973). Also, verification was employed to protect the seller against customer fraud or misrepresentation. The Court of Appeals found that the record contained evidence to support the foregoing description of verification (Pet. App. 12a; 550 F.2d at 120; see *infra*, 13).

USG stopped verifying on gypsum products for business reasons by mid-1968, well before the December 1968 commencement of the statutory period.[22] National Gypsum stopped

[22] Both prosecution and defense witnesses testified to this fact (II A. 889; III A. 1423-24; I A. 267-68, 211-12, 264; II A. 678-80, 683). USG personnel recommended that the company stop verifying because changed market conditions and competitive strategies made verification unnecessary. After consultation with counsel, that recommendation was adopted (III A. 1423-25). One document purports to show that in February, 1971, Celotex initiated a single verification call to an unidentified person in USG's Credit Department pertaining to a credit term to a specific account (V A. 2519). With the exception of this one incident, there is no evidence of any departure from USG's 1968 decision not to verify.

no later than January 1969 when this Court decided *United States* v. *Container Corp.*, 393 U.S. 333 (1969).[23] Georgia Pacific's verification contacts were minimal during the statutory period, and none were with USG or National.[24] Celotex continued limited verification during the statutory period, primarily with smaller and single-plant producers, because of the advice of its counsel respecting the scope of *Container* and the requirements of the Robinson-Patman Act.[25] *Not a single verification contact occurred among the three largest producers in the industry within the statutory period.* Most verification during the statutory period was among single-plant producers which the Government did not join as defendants in this case.

None of the three individual defendants verified in the statutory period. Colon Brown and Jay Nicely never verified at all (III A. 1587, 1518-19). Andrew Watt stopped verifying in the fall of 1967 (III A. 1420-22).

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[23] National stopped verifying no later than this Court's *Container* decision in January, 1969, with three limited and unauthorized exceptions. (II A. 591-92, 638-39, 1032-33, 696-97, 702, 681-83, 830-31; C.A.App. 117 ex).

[24] G-P's general sales manager verified a total of 10 or 12 times from June of 1969 to early 1972 (I A. 520). None of these verification contacts was with USG or National (I A. 508-09). Montgomery of Republic Gypsum, a single plant producer, testified that he made possibly four calls to the general sales manager at Georgia Pacific, who never called him, and that he ceased calling because G-P's general sales manager was not able to answer his questions (II A. 685). The only evidence of any additional verification contacts by G-P in the statutory period pertained to two possible credit verification calls by G-P to Kaiser and, by inference, one to Johns-Manville in January, 1970 (V A. 2537-39).

[25] III A. 1255-57. Celotex' assistant product manager testified that during the period from August, 1969 to November, 1973, he acted on many thousands of requests by Celotex salesmen to meet price competition, yet during this active period he only initiated maybe six verification calls and received maybe seven or eight verification calls, all involving Grand Rapids and Flintkote (III A. 1295-96). His superior, who died in 1973, made about one verification call per month during the 1969-73 period (III A. 1296). Celotex' credit manager testified that he stopped verifying sometime in 1971 after a discussion with counsel (II A. 826).



Moreover, both before and during the statutory period, respondents' purpose for verification was lawful. Respondents' verification was undertaken pursuant to legal advice regarding the requirements of the Robinson-Patman Act. Drafts of USG's 1962 statement of company policy permitting verification, which were prepared by outside counsel, expressly referred to the Robinson-Patman Act and the need to comply with it as lawful reasons to contact competitors (V A. 2769 at p. 2773; *compare* Gov. Br. 13). Similarly, personnel of the other corporate respondents who were responsible for conducting verification consulted with their counsel on Robinson-Patman compliance, and were advised that verification was legally permissible (II A. 728-29, 642-43, 743-44, III A. 1255-57, I A. 500-01).

Virtually every witness who testified about the purpose for verification stated that it was done either to comply with the Robinson-Patman Act or to protect against buyer fraud, or both.[26] Government witnesses from small gypsum producers, who were neither defendants nor alleged co-conspirators, also testified that they verified prices in order to avoid unlawful price discrimination and customer fraud.[27] The Government's brief concedes that "[e]ach present or former official of the corporate defendants who testified stated that the information was exchanged in anticipation of the need to establish the 'meeting competition' defense to a charge of price discrimination" (Gov. Br. 13).

In summary, respondents presented substantial evidence of their lawful purposes for verification. When coupled with the infrequency of verification in the statutory period, and the

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[26] *See* Bear (I A. 187), Gimlin (I A. 363-66), Galvin (II A. 943-44), Watt (III A. 1420-21), Atwell (II A. 628-29), Hayes (II A. 1034), Brown (III A. 1586-87), Nicely (III A. 1521-22), Burch (I A. 511), Sikes (II A. 582-84), A. L. Meyer (II A. 564-65), McCaskill (I A. 429,443), Jarrett (II A. 833-34) and Fisch (III A. 1291-93).

[27] *See*, II A. 753-58 (Van Cleave, Texas Gypsum); II A. 683-84 (Montgomery, Republic); I A. 206 (Simpson, Republic).

uncontradicted economic evidence of price competition in that period, respondents' evidence of a lawful purpose for verification directly confronted the Government's theory at trial that respondents' verification had the purpose and the effect of stabilizing prices during the period open to prosecution. On the basis of this evidence, the Court of Appeals concluded that respondents were entitled to instructions fairly presenting their case to the jury (Pet. App. 12a, 28a-29a; 550 F.2d at 120, 126-27).



## SUMMARY OF ARGUMENT

### I.

The trial court erred by instructing the jury that respondents could be convicted of a criminal Sherman Act offense if the jury found respondents' verification had any effect on prices, regardless of the actual purpose for such verification. Indeed, the trial court went even further and instructed the jury to "presume, as a matter of law" that respondents' purpose for verification was unlawful if it found that verification had a stabilizing effect on prices. These instructions were contrary to the prior decisions of this Court holding that, even in civil cases, price information exchanges are lawful under the Sherman Act when done for lawful purposes. Respondents' purposes for verification were to establish a "good faith meeting competition" defense under Section 2(b) of the Robinson-Patman Act and to prevent customer fraud. Every federal court to consider the issue, except the trial court below, has held that information exchanges for these purposes do not violate the Sherman Act even if the exchanges result in more stable prices.

The trial court's erroneous verification instruction was inconsistent not only with the authorities interpreting the Sherman Act, but also with the theory of the indictment and the Government's case at trial, both of which placed respondents' purpose in issue. Having extensively responded to the Government's challenge to their purpose for verification, respondents were severely prejudiced when the trial court instructed the jury that their actual purpose was irrelevant.

### II.

Even if this Court were to accept the trial court's theory that a criminal Sherman Act violation in an information exchange case requires no proof of unlawful purpose, or were to

accept the Court of Appeals' rule that Robinson-Patman compliance is a legitimate reason for such exchanges only in the most narrowly restricted situations, such a rule could not be applied retroactively to these respondents without violating due process and respondents' rights to fair notice. Such an after-the-fact judicial expansion of the definition of a criminal offense would operate like an *ex post facto* law enacted by a legislature, and would impermissibly deny respondents fair notice of what constituted unlawful conduct.

III.

The trial court failed to instruct the jury properly on elementary principles of conspiracy law. Thus, the jury was not instructed to determine a respondent's understanding of the scope and purpose of any agreement which that respondent allegedly joined. Given the sprawling and fragmented 13-year conspiracy charged in the indictment, such an instruction was essential to ensure that a respondent was not deprived of the protection of the statute of limitations by being held liable for the conduct of others in the statutory period to which he was not committed.

The instruction on abandonment of or withdrawal from a conspiracy was also erroneous. That instruction limited withdrawal and abandonment to two narrow acts, and thus prevented the jury from considering as evidence of withdrawal respondents' vigorous price competition prior to and throughout the statutory period.

IV.

The trial judge erred by forcing a jury which was "hopelessly deadlocked" after seven days of deliberations to reach a verdict. Despite repeated "dynamite" charges, the jury twice



declared itself deadlocked and told the judge that "no document, no remembrance of testimony," but only "compassion for fellow jurors" would bring about unanimity. The trial judge met with the jury foreman out of the presence of defense counsel and confirmed the jury's belief that he wanted a verdict "one way or the other" and would not "accept" a deadlock. Shortly thereafter, the jury returned guilty verdicts. Under the decisions of this Court, such judicial conduct constituted improper coercion of the jury.

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY FOUND REVERSIBLE ERROR IN THE INSTRUCTIONS TO THE JURY THAT RESPONDENTS' PURPOSE FOR VERIFICATION WAS IRRELEVANT TO DECIDING THEIR GUILT OR INNOCENCE.

The Government concedes that the trial judge instructed the jury to ignore respondents' actual purpose for verification, and to convict respondents, if verification had a stabilizing effect on prices (Gov. Br. 56, 71). Indeed, the jury was directed in this criminal case to presume that respondents had an unlawful intent, regardless of the actual evidence on this issue, if the effect of verification was to stabilize prices (IV A. 1722). To support these erroneous instructions, the Government now argues, as it must, that any information exchange which has any effect on prices is a criminal offense, even if the purpose for the exchange is entirely lawful and wholly unrelated to any intent to increase, fix, or stabilize prices (Gov. Br. 76).[28]

The Government's proposition is inconsistent with fifty years of Supreme Court precedent which holds that purpose is a necessary consideration in determining the lawfulness of information exchanges. A contrary holding in the factual context of this case would result in a rule of law which every federal court considering the issue, save the trial court below, has found impossible to accept: that an information exchange for the purpose of complying with the Robinson-Patman Act or to prevent customer fraud constitutes a violation of the Sherman Act. Neither legal authority nor economic analysis supports the Government's position, particularly in a criminal case.[29]

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[28] The Government's theory would make even the more stable prices which, in some circumstances, *inevitably* result from compliance with the Robinson-Patman Act, a basis for Sherman Act convictions. See *infra*, 38.

[29] Although this case was prosecuted as a misdemeanor offense, the recent amendment of the Sherman Act upgrading the criminal offense to a felony, and vastly increasing the penalties therefor, intensifies the potential impact of the rule of law which the Court may adopt in this case. *Cf. United States* v. *Park*, 421 U.S. 658, 682-83 (1975) (Stewart, J., dissenting).



The trial court's erroneous instruction to ignore respondents' purpose for verification must be viewed in the context of the Government's theory of the case at trial. The indictment charged respondents with participating in a continuing 13-year conspiracy to fix gypsum board prices, terms and conditions, and packaging and handling methods (I A. 34). The indictment and the Bill of Particulars made clear that respondents' verification was attacked only as a "means" of "effectuating" this alleged conspiracy, and that respondents' information exchanges were allegedly "for the purpose of raising, fixing, maintaining and stabilizing prices of gypsum wallboard and increasing profits" (I A. 34-35, 37-39; *see also* Gov. Br. 5, 71). To rebut the accusation that their verification communications were for the purpose of furthering a broader conspiracy (Gov. Br. 76 n.72), respondents adduced extensive evidence at trial that the communications were actually for the purpose of verifying the accuracy of customers' claims of lower prices purportedly offered by competitors in order to: (a) comply with Section 2(b) of the Robinson-Patman Act by establishing a *bona fide* basis for extending a lower price to meet a competitor's reported lower price offer, or (b) prevent being defrauded by lying customers. See *supra*, 11, 13.

In response to this evidence of respondents' actual purpose, the Government itself requested a jury instruction which stated that respondents' purpose for verification was an issue for jury determination under the Government's theory of the case:

> "The government asserts that defendants' purpose was not solely to establish their 'good faith' under the Robinson-Patman Act but that they exchanged competitive information *for the purpose of maintaining or stabilizing prices.* . . .
>
> ". . . [I]f you find that the purpose of these exchanges was *for reasons other than to ensure compliance with the Robinson-Patman Act*, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to maintain or stabilize prices" (Gov. Req. 15c, IV A. 1884-85, emphasis added).

Respondents likewise requested jury instructions explaining the relevance of their purpose evidence to the prosecution's theory that information exchanges were in reality one method of effectuating a broader conspiracy (Def. Req. Final Instr. 20, IV A. 1853; 26-33, IV A. 1856-60; Def. Supp. Req. 15-21, IV A. 1915-17), including an instruction on this precise issue previously approved by the Court of Appeals for the Ninth Circuit (Watt Supp. Req., IV A. 1893). *See Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

The trial court rejected respondents' requests except for twice promising to give the key portion of the Ninth Circuit instruction (IV A. 1619, 1643).[30] Then, without preparing written instructions (IV A. 1612, 1745, 1770-71), the judge extemporized his final charge to the jury.[31] In so doing, the judge not only omitted the Ninth Circuit instruction, but also departed significantly from even the Government's formulation of the purpose issue set forth in its above-quoted request:

> "However, if you decide that the *effect* of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [ex]changes as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize prices. . . .

[30] The key sentence of the Ninth Circuit instruction was:

> "If you find that defendant sought price or other information from competitors pursuant to its reasonable belief of the obligations of the Robinson-Patman law and not to fix prices, then you should find that no violation of the law took place." (Watt Supp. Req.; IV A. 1893)

*See Jones* v. *Shell Oil Co.*, Civ. No. 47261 (N.D. Cal.), *aff'd sub nom. Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

[31] Because no written charge was prepared despite the length and complexity of the trial, the court was unable to repeat the verification instruction when requested by the jury less than an hour after it was given and was forced to admit to the jury "you sort of caught me short. . . . Now, I have notes, but I didn't use the precise language in charging you. So, until the Court Reporter who took the charge has made a transcript of it, there is no way for me to read it" (IV A. 1770-71). The verification instruction was therefore not repeated until the next day (IV A. 1772-83).



> ". . . If the effect of such exchanges was to raise, fix maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act *regardless of the specific purpose* that the parties to the agreement had in their minds. . . .
>
> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the *effect* of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are *presumed, as a matter of law,* to have intended that result" (IV A. 1721-22, emphasis added).

Therefore, even though the purpose for respondents' verification had been a central element of the offense charged in the indictment, the focus of the Government's case as tried, and the subject of voluminous evidence introduced by respondents, the trial judge instructed the jury to ignore respondents' purpose. After reviewing the controlling decisions of this Court and the unanimous holdings of each other federal court to consider the question, the Court of Appeals concluded that "[t]he refusal to instruct the jury about the relevance of purpose was . . . reversible error" (Pet. App. 13a, 550 F.2d at 121).

**A. This Court Has Consistently Held That Purpose is a Necessary Consideration In Information Exchange Cases, And That Such Exchanges Are Lawful, Even When They Result in More Stable Prices, If Their Purpose Is Lawful.**

The Government admits that "it is not a *per se* violation of the antitrust laws to exchange competitive information" (Gov. Br. 76), and notes "the undisputed proposition that information exchanges are not *per se* illegal" (Gov. Br. 83 n. 75).[32] This

[32] These statements underscore the unusual, if not unprecedented, nature of this prosecution. The Antitrust Division's own guidelines state as a "firm rule" that criminal prosecutions are brought only for Sherman Act violations which are either *per se* unlawful or willfully intentional. *Task Force Report: The President's Commission on Law Enforcement and Administration of Justice, Crime and Its Impact, An Assessment,* 110 (1967), reprinted in *Antitrust Law Developments,* 236-37 (1975). The theory which the trial court belatedly adopted and which the Government is now forced to defend satisfies neither of these two criteria.

concession renders fundamentally unsound the Government's argument that, irrespective of other considerations such as purpose, information exchanges are automatically illegal if they affect prices (Gov. Br. 76). The prior decisions of this Court establish that the lawfulness of conduct which is not a *per se* Sherman Act violation must necessarily be evaluated by the "rule of reason." *See Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *U.S.* , 97 S. Ct. 2549 (1977); *White Motor Co.* v. *United States*, 372 U.S. 253 (1963). In addition to weighing the "effect" of conduct, a rule of reason analysis involves the consideration of all "relevant facts," specifically including "the purpose or end sought to be attained." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

Fifty years of Supreme Court precedent confirm the relevance of purpose in determining the legality of business information exchanges. This now well-established principle of antitrust law was first enunciated in *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563 (1925), and *Cement Mfrs.' Protective Ass'n* v. *United States*, 268 U.S. 588 (1925), was continued in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), and was again reaffirmed as recently as *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86 (1975). The Government's attempt to distinguish *Maple Flooring*, *Cement*, and *C&S Bank* by arguing that in those cases the information exchanges were not part of a "broader price-fixing conspiracy" (Gov. Br. 76 n. 72)[33] merely highlights the error of

[33] The Government also attempts to distinguish authority contrary to its position by claiming the verdict in this case *necessarily* establishes that respondents' verification had a stabilizing effect on prices (Gov. Br. 71-72, 76 n. 71, 81-82 n. 74, 83 n. 75). Although the final charge must be evaluated on the basis that the jury *could* have convicted solely because it found a stabilizing effect (*infra*, n.34), any assumption that the jury *necessarily* did so is invalidated by the trial errors which tainted the verdict, many of which have not yet been considered even by the Court of Appeals (see *supra*, 2). For example, because of the inadequate instruction on "withdrawal and abandonment" (see *infra*, 61-66), the jury might have convicted respondents by finding price stability which did not continue into the statutory period.



the final charge below. That final charge did not require the jury to find that respondents' information exchanges were part of any "broader price-fixing conspiracy," and the Government may not now assume that such a finding was made. To the contrary, as the Government concedes, the jury was permitted to convict respondents solely on the basis that their information exchanges in some manner "affected prices," regardless of their purpose (Gov. Br. 56, 71).[34] The decisions of this Court reveal the clear error of this proposition.

In *Maple Flooring*, this Court approved a far-reaching and comprehensive system of exchanging competitive information, including "prices at which the commodity has actually been sold," 268 U.S. at 585, as well as a wide variety of cost, freight, and inventory information, 268 U.S. at 566-67. Notwithstanding the Court's express recognition that the systematic information exchange would tend to stabilize prices, 268 U.S. at 582, it held that the exchange was lawful because no illegitimate purpose for it had been established:

> "Persons who . . . report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information." 268 U.S. at 584.

As this language indicates, *Maple Flooring* specifically rejected the theory of "pricing through ignorance" which the Govern-

[34] Because of these instructions, the Government admits the verdict must be viewed as though it stood entirely on a conclusion that respondents' information exchanges were unlawful solely because they "affected prices" (Gov. Br. 72 n. 67). The verdicts cannot be sustained by resorting to an alternative assumption about the meaning of the jury verdict. *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *see also Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946).

ment has again argued in the present case (Gov. Br. 67, 74-75 including n. 69):

> "Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. . . . It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations. . . ." 268 U.S. at 583.

*Maple Flooring* also rejected another argument suggested by the Government here: that exchanges of price information should be prohibited because they "are a useful conduit for establishing price-fixing agreements" (Gov. Br. 67, 75, 77, 90-91). The Court held that even in a civil case actual proof of an agreement with such an unlawful purpose was required to find a Sherman Act offense. 268 U.S. at 585-86.[35]

In *Cement Mfrs.' Protective Ass'n* v. *United States*, 268 U.S. 588 (1925), this Court extended *Maple Flooring* by holding that price information exchanges were lawful even where (1) they related to specific customers and jobs, and (2) the exchanges were made directly between competitors rather than through a trade association. Consistent with the reasoning of *Maple Flooring*, the *Cement* information exchanges were upheld because the exchanges were for the lawful purpose of preventing customer fraud:

[35] In so holding, the Court in *Maple Flooring* cited *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and *United States* v. *American Linseed Oil Co.*, 262 U.S. 371 (1923), which, according to the Government, establish that information exchanges with a stabilizing effect are illegal regardless of purpose (Gov. Br. 75). However, in both of these cases the Court determined that the actual purpose of the exchanges was to suppress price competition. As the *Maple Flooring* Court observed, in *American Column & Lumber*, "active and concerted efforts were made to suppress competition," 268 U.S. at 580, and the *American Linseed Oil* case involved information exchanges which had as their "one purpose and effect" the restraint of competition, 268 U.S. at 582. *See also Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941), and *infra*, n.39.



> ". . . [I]n our view the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers would act on the information. . . .
> ". . . [F]or reasons stated more at length in our opinion in *United States* v. *Maple Flooring Association*, supra, we cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise . . . as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned." 268 U.S. 603-04.

As in *Maple Flooring* and again in the instant case, the Government argued in *Cement* that information exchanges should be prohibited due to "the necessary leveling effect upon prices of knowledge disseminated among sellers. . . ." 268 U.S. at 605. Although the trial court had found that the *Cement* information exchange "tended to produce uniformity in price," 268 U.S. at 593, and even though this Court "assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price," 268 U.S. at 604, the Court nevertheless held that the exchanges were not even civil violations of the Sherman Act.[36]

Subsequent decisions in *Sugar Institute* v. *United States*, 297 U.S. 553 (1936), *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945), and *Seagram & Sons* v. *Hostetter*, 384 U.S. 35 (1966), confirmed that price information exchanges were lawful under the Sherman Act.[37] In *Sugar Institute*, where

[36] The Government's attempt to distinguish *Cement* on the grounds that it involved only "closed" transactions (Gov. Br. 83 including n. 75) is invalid (see *infra*, 42-43).

[37] *See also Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933), where the Court sustained a joint selling arrangement on the authority of both *Maple Flooring* and *Cement*, "although stabilization of trade and more reasonable prices may be the result." 288 U.S. at 374.

a price-fixing conspiracy had actually been proved (*compare* Gov. Br. 76 n. 72), the Court struck from a lower court's decree a ban on "reporting or relaying" among competitors "current or future prices, terms, conditions, or freight applications," and stated that such a competitive information exchange, "subject to the restrictions imposed by the decree does not appear to involve any unreasonable restraint of competition." 297 U.S. at 602-604. In *Hartford-Empire*, dissemination of price information among competitors was characterized as a "lawful end" in reliance on *Maple Flooring* and *Cement*. 323 U.S. at 428. Finally, in *Seagram & Sons* the Court ruled, in reliance on *Maple Flooring*, that a price information exchange for the purpose of complying with a state law would not violate the Sherman Act. 384 U.S. at 45.[38]

The Government's brief relies heavily upon this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). But that case reaffirmed the principles set forth in the foregoing precedents. Although, in a *civil* context, *Container* found unlawful a particular agreement to exchange price information which stabilized prices, the opinion expressly stated that the facts before the Court were "unlike any other price decisions we have rendered," including *Maple Flooring* and *Cement*. 393 U.S. at 334-35. The Court stressed that the specific point of distinction between *Container* and *Cement* was the absence in *Container* of a lawful purpose for the price exchange, which would have constituted a legitimizing "controlling circumstance":

> "While there was present here, as in *Cement Mfrs. Protective Assn.* v. *United States*, 268 U.S. 588, an exchange of prices to specific customers, there was absent the controlling circumstance, *viz.*, that cement manufacturers,

[38] During this period, lower Federal courts also recognized the legitimacy of price information exchanges under this Court's decisions. *See Salt Producers Ass'n* v. *Federal Trade Commission*, 134 F.2d 354, 359 (7th Cir. 1943); and *Tag Mfrs.' Institute* v. *Federal Trade Commission*, 174 F.2d 452, 457 (1st Cir. 1949).



> to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job." 393 U.S. at 335.

In the absence of any "controlling" lawful purpose, the Court analogized the *Container* price exchange to those in *American Column & Lumber Co.* v. *United States, supra*, n. 35, and *United States* v. *American Linseed Oil Co., supra*, n. 35, where the Court had found anticompetitive purposes. 393 U.S. at 337.[39] Thus, in the absence of a lawful purpose, the *Container* Court, in a civil case, inferred an unlawful agreement from the defendants' exchange of price information. *See Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 782, *reh. denied*, 423 U.S. 886 (1975).

The Government is wrong in suggesting that the Court in *Container* ruled, *sub silentio*, that the lawful purposes of preventing customer fraud and of complying with the Robinson-Patman Act were irrelevant in determining the legality of price exchanges (Gov. Br. 83-84). The *Container* opinion does not state that the purpose of preventing fraud found lawful in *Cement* was irrelevant, but rather holds that such a purpose was "absent." 393 U.S. at 335. As the Court of Appeals below correctly observed:

> "If purpose were always irrelevant, . . . then the *Container* Court would effectively have overruled *Cement Manufacturers*. *See The Supreme Court*, 1968 Term, 83 Harv. L. Rev. 7, 234-5 (1960). Yet the vitality of *Cement Manufacturers* has been reaffirmed by favorable citation in Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 781,

[39] In *American Column & Lumber*, the defendants, by agreement, pursued a common, "persistent purpose" to restrict production and increase prices. 257 U.S. at 405, 407, 409-10. In *American Linseed Oil*, the Court found that, in requiring adherence by competitors to published prices, the defendants' "manifest purpose was to defeat the Sherman Act. . . ." 262 U.S. at 390 (see also *supra*, n. 35).

*reh. denied*, 423 U.S. 886 (1975), and United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113 (1975)." Pet. App. 19a, n. 9, 550 F.2d at 123, n. 9.

The Robinson-Patman issue was also not present in *Container*. The defendants there did not claim that their exchanges were for the purpose of complying with the Robinson-Patman Act, nor could they have. The products involved were made to customers' individualized specifications and thus were not of "like grade and quality" among customers within the meaning of the Robinson-Patman Act (15 U.S.C. § 13(a)).[40] Moreover, the *Container* defendants were frequently beating competition, not just meeting it, and thus would have been violating the Robinson-Patman Act had it applied (15 U.S.C. § 13(b)). *See United States* v. *Container Corp.*, 273 F.Supp. 18, 22 (M.D. N.C. 1967); Note, 25 Baylor L. Rev. 357, 364 (1973).

On appeal, the *Container* defendants mentioned the Robinson-Patman Act once in their brief, but only as a hypothetical illustration of why a *per se* rule prohibiting all price information exchanges would be unwise (Brief for Appellees, No. 27, October Term, 1968, pp. 42-43). As the concurring opinion of Justice Fortas makes clear, *Container* in fact did not set forth a *per se* rule regarding information exchanges, 393 U.S. at 338, a point this Court reaffirmed in *Goldfarb* by referring to Justice Fortas' concurring opinion when explaining the holding of *Container*, and by citing *Maple Flooring* with approval. *See* 421 U.S. at 773, 782.

Any possible ambiguity concerning the continued relevance of purpose in determining the lawfulness of price exchanges, and about the post-*Container* vitality of *Maple Flooring* and *Cement*, was resolved by this Court's decision in *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86

[40] In contrast, there is no dispute in the present case that most gypsum board is homogeneous and generic in nature (Gov. Br. 7), and therefore is a commodity of "like grade and quality" for Robinson-Patman purposes.



(1975). The Court there held that a "constant and detailed" exchange of information on interest rates and service charges (which the Court characterized as "price information") was not illegal because its purpose was to achieve the benefits of competition while complying with a state law. 422 U.S. at 113-14, 116.[41] Citing *Maple Flooring*, *Cement*, and Justice Fortas' concurring opinion in *Container*, the Court noted that the "dissemination of price information is not itself a *per se* violation of the Sherman Act" and held that *C&S Bank* was not a case of "competitors having no *permissible reason*" for the price information exchange. 422 U.S. at 113, emphasis added. The fact that "lack of significant price competition" was the "result of the sharing of expertise and information" did not make the price exchange illegal. 422 U.S. at 114.

Both before and after *C&S Bank*, lower courts which confronted the issue held that *Container* did not eliminate the need to establish an improper purpose. *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1360 (9th Cir. 1976) ("Unlike [*Container*], this case does not involve companies exchanging secret price information for the *purpose* of price stabilization."); *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972) ("Shell's evidence . . . created an issue of fact . . . on the *purpose* of obtaining such information."); *United States* v. *Nu-Phonics, Inc.*, 433 F.Supp. 1006, 1012-1013 (E.D. Mich. 1977) ("The nature of the government's burden, in proving *anticompetitive purpose*, depends upon which type of price fixing is charged. . . . [A]greements which merely create the potential power for price maintenance must be shown to be price-fixing agreements [citing *Container*]. The anticompetitive *purpose* of such an agreement is not apparent, and, therefore, must be proved.") (Emphasis added in foregoing quotations.) See also *Webster* v. *Sinclair Refining Co.*, 338 F.Supp. 248, 252 (S.D. Ala. 1971);

[41] The state law involved in *C&S Bank* prohibited branch banking. The challenged exchange of price information permitted the principal defendant to engage in procompetitive *de facto* branching without violating the state law. 422 U.S. at 89-93, 111-20.

*Wall Products Co.* v. *National Gypsum Co.*, 326 F.Supp. 295, 312-314 (N.D. Cal. 1971).[42]

Thus, fifty years of Supreme Court and lower court precedent have confirmed that an inquiry into purpose is necessary in determining the legality of information exchanges. These decisions have upheld exchanges for lawful purposes, even where they resulted in more stable prices. Therefore, the trial judge in this case erred by eliminating the purpose issue from jury consideration.

**B. Criminal Liability Should Not Be Imposed for Respondents' Efforts to Comply with the Robinson-Patman Act.**

Substantial evidence in the record supports the fact that respondents' purpose for business information communications was compliance with the requirements of § 2(b) of the Robinson-Patman Act by establishing a *bona fide* basis for extending a lower price to meet a competitor's reported lower price offer. (see *supra*, 13).[43] In view of this evidence, the Court of Appeals found that the trial judge had committed reversible error in refusing "to instruct the jury about the relevance of purpose" to the alleged Sherman Act violation. Pet. App. 12a, 28a-29a; 550 F.2d at 121, 126-127. Contrary to the Government's assertion, this aspect of the Court of Appeals' ruling was assuredly not "novel" (Gov. Br. 72).

A purpose to avoid violating a state law was held a permissible reason for exchanging price information in *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86

[42] The Government's brief cites one district court civil case in its effort to marshal contrary authority to the above decisions, *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F. Supp. 1090 (N.D. Tex. 1976), appeal pending, C.A. 5, No. 76-4321 (Gov. Br. 81-82 n. 74). However, that case specifically states that a purpose "to avoid fraud as in *Cement Manufacturers Protective Association* or to avoid liability for price discrimination" is "not only a relevant but a significant litmus." 421 F.Supp. at 1107.

[43] Respondents also had the lawful purpose of preventing customer fraud (see *infra*, 39-43).



(1975). (See the discussion of *C&S Bank*, *supra*, 28-29.) Similarly, in *Seagram & Sons* v. *Hostetter*, 384 U.S. 35 (1966), this Court unanimously declared that the exchange of price information for the purpose of complying with a state law by filing affirmations regarding wholesale price levels would not violate the Sherman Act. 384 U.S. at 45.

It is thus anomalous for the Government to argue that an information exchange to comply with a federal law—indeed, another federal "antitrust law"—warrants criminal punishment. The Government cites no legal precedent for this position, nor can it. As the Court of Appeals stated:

> "Except for the court below, each court to consider the issue has agreed with [respondents] that the attempt to establish a 2(b) defense amounts to a 'controlling circumstance' that shields those exchanging information from Sherman Act liability." Pet. App. 22a, 550 F.2d at 124.

In short, information exchanges for the purpose of Robinson-Patman compliance do not violate the Sherman Act. *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 744-47 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175, 181-82 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S.D. Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295, 308-15 (N.D. Cal. 1971); *Di-Wal, Inc.* v. *Fibreboard Corp.*, CCH 1970 Trade Cases ¶ 73, 155 (N.D. Cal. 1970). The last two cases specifically upheld the legality of the verification practice in the gypsum industry now before this Court.

The authorities upholding information exchanges for the purpose of Robinson-Patman compliance demonstrate that the Government begs the question in arguing that Robinson-Patman compliance no more excuses Sherman Act violations than it does violations of other criminal statutes (Gov. Br. 2, 69, 89-90 including n.81). Information exchanges for a lawful purpose, such as Robinson-Patman compliance, do not violate

the Sherman Act in the first instance. Indeed, only those exchanges which are for an anticompetitive purpose are illegal (see *supra*, 21-30).

All of the above-cited decisions were civil Sherman Act cases. *A fortiori*, their rationale applies in this criminal prosecution under the same statute. The Government's only response to this unanimous position of the lower federal courts is simply to assert that they are "incorrect" (Gov. Br. 81-82 n.74).[44] However, the Government's use of this criminal prosecution to "correct" what it perceives to be an erroneous, though persistent, view of the law is seriously misdirected. Not even the vagaries of antitrust law enforcement should countenance, as did the trial judge's charge in this case, the imposition of criminal liability for conduct which was expressly approved by four federal courts prior to the return of the indictment (see *infra*, 50-55).

Moreover, these federal courts have not been "incorrect". Each court, now including the Court of Appeals below, has decided that a purpose to comply with the Robinson-Patman Act is a legitimizing "controlling circumstance" under *United States* v. *Container Corp.*, 393 U.S. 333 (1969). The Government's argument that the "controlling circumstance" language of *Container* should not be interpreted in this manner (Gov. Br. 82-84) is not supported by any legal precedent and, moreover, cannot be squared with a plain reading of the *Container*

[44] In view of Government's claim that *Gray* v. *Shell Oil Co.*, *supra*, and *Belliston* v. *Texaco, Inc.*, *supra*, are distinguishable because there allegedly was no price stabilization in those cases (Gov. Br. 81-82 n.74), it should be noted that (1) the Ninth Circuit in *Gray* expressly recognized but found undeterminative the argument that exchanges of price information resulted in "identical wholesale prices, which moved up and down in tandem," 469 F.2d at 746; and (2) the Tenth Circuit in *Belliston* unreservedly embraced the rationale of *Wall Products Co.* v. *National Gypsum Co.*, *supra*, declaring that "The rationale of the *Wall Products* case is applicable here." 455 F.2d at 182. *Wall Products* found price information exchanges lawful even though they "had a tendency to stem the decline of prices." 326 F.Supp. at 311.



opinion, particularly when it is viewed in light of this Court's subsequent decisions and its interpretation by lower federal courts (see *supra*, 26-30).

Consistent with this uniform approach of other federal courts, the Court of Appeals below based its conclusion that a purpose to comply with the Robinson-Patman Act is a "controlling circumstance" upon a careful consideration of sellers' heavy burden in establishing a "meeting competition" defense under Section 2(b) of the Robinson-Patman Act (Pet. App. 12a-29a, 550 F.2d at 120-27). This heavy burden originates in decisions of this Court.

In *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 741 (1945), the Court held that statements regarding competitive price offers which did not come from persons with "personal knowledge of the transactions" were insufficient to meet the Section 2(b) burden. In *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), decided the same day, this Court held that a seller's failure to "investigate or verify" salesmen's and buyers' claims of competitive price offers precluded any reliance on the good faith meeting competition defense:

> "The facts as stipulated were only that the discriminations were made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations. . . . The record . . . discloses no efforts by respondents to investigate or verify them, and no evidence of respondents' knowledge of their informants' character and reliability. . . ." 324 U.S. at 758.

In a normal two-party, buyer-seller transaction, the only persons with "personal knowledge" of the transaction are the buyer and the seller. If a competing seller cannot, under *Staley*, rely upon the representations of the buyer in meeting the first seller's price offer, how is the competing seller to further

"investigate or verify" other than with the first seller—the only other party with the "personal knowledge" required by *Corn Products?*

The Government's brief ducks this crucial question and instead offers generalized platitudes that a seller need only make "reasonable" inquiries to verify the accuracy of reported competitive price offers (Gov. Br. 69, 86, 88 n. 79).[45] However, the Government's repeated rejection of attempts to establish the 2(b) good faith meeting competition defense with "reasonable" efforts short of verification with competitors is an undeniable historical fact. For almost thirty years after passage of the Robinson-Patman Act, the Federal Trade Commission did not allow a single seller to avail himself of the meeting competition defense. *See* Section on Antitrust Law of American Bar Association, *Antitrust Law Developments* 144 n. 231, and accompanying text (1975).

The Federal Trade Commission, with the full support of the federal courts, has continued to apply rigorously the *Staley* requirements to "investigate or verify." *See, e.g., National Dairy Products Corp.* v. *Federal Trade Commission,* 395 F.2d 517, 524, 528-29 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F.2d 47, 55-56 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965).[46] Of

[45] Similarly, the Federal Trade Commission's "agreement" with the Department of Justice interpretation of the Robinson-Patman Act (*see* Gov. Br. 87 n.78) also evades any explanation of "proper methods of verification." Pet. App. 98a.

[46] In *Forster,* the court emphasized that a seller cannot establish the meeting competition defense by relying only on customer reports of lower price offers since the buyer wants to buy as cheaply as he can and has an inducement to misrepresent competitive offers. 335 F.2d at 56. Perhaps it is true, as the Government appears to suggest (Gov. Br. 80, 88), that more rigorous enforcement of the Robinson-Patman Act's Section 2(f) "lying buyer" provision would temper buyers' natural inclination to misrepresent competitive offers. However, under the authorities, the seller would still retain the obligation to investigate or verify whether the buyer is lying. Moreover, the Government's suggestion of a more appropriate future policy is irrelevant to evaluting the legality of respondents' past conduct in this criminal prosecution.



particular importance has been the Federal Trade Commission's "meet but don't beat" rule imposed on sellers attempting to utilize the meeting competition defense.[47] A seller can be denied the benefit of the defense if his price is lower than that of the competitor whose price is "met," *Purolator Products, Inc.* v. *Federal Trade Commission,* 352 F.2d 874, 885 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968), thus requiring the seller to have very reliable and precise information concerning the exact price offered by the competitor.[48]

The opinion in *Viviano Macaroni Co.* v. *Federal Trade Commission,* 411 F.2d 255 (3rd Cir. 1969), summed up the stringent requirements for investigation and verification in rejecting a seller's attempt to establish a meeting competition defense:

> "We think that it is clear from the Supreme Court opinion in *Staley* that petitioner was under a *duty to investigate or verify* the oral communication of [the customer] as well as the reliability of [the customer] himself in view of the 'tendency of buyers to secure the most advantageous terms of sales possible.'" 411 F.2d at 259 (emphasis added).

According to *Viviano,* the seller even "showed a lack of good faith" in failing to corroborate further a report of a competitor's concessions which was based upon intimate familiarity with the

[47] *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 241-42 (1951); *National Dairy Products Corp.,* 70 F.T.C. 79 (1966), *aff'd,* 395 F.2d 517 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); *Anheuser-Busch, Inc.,* 54 F.T.C. 277, 301-02 (1957), *rev'd on other grounds,* 265 F.2d 677 (7th Cir. 1959) (absence of price discrimination), *rev'd,* 363 U.S. 536 (1960), *order again set aside,* 289 F.2d 835 (7th Cir. 1961) (absence of injury to competition).

[48] One commentator has observed that the courts require a seller asserting a "meeting competition" defense to establish "an elaborate verification plan aimed at determining the identity of the offeror of a given lower price and, if possible, the exact offer." Eaton, "The Robinson-Patman Act: Reconciling The Meeting Competition Defense With The Sherman Act," 18 *Antitrust Bulletin* 411, 419 (1973).

particular market gained by a salesman with 18 years' experience. 411 F.2d at 259.[49]

The Government's response to the difficult situation of a seller who desires to compete in the marketplace, but who cannot determine whether the buyer has correctly represented an alleged lower price, is to offer three "choices" (Gov. Br. 69, 88-89). First, the seller can "gamble" and risk violating the Robinson-Patman Act.[50] The irresponsibility of the Government's encouragement of businessmen, and their antitrust counsel, to "gamble" on violating the law is apparent, and merits no further comment.

Alternatively, according to the Government, the seller may either decline to cut his price to the particular buyer involved, and thus be uncompetitive, or initiate a general price reduction to all customers in the market. However, in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951), this Court unequivocally rejected such an interpretation of the Robinson-Patman Act while affirming the importance of the Section 2(b) meeting competition defense: "There is nothing to show a Congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition. . . ." 340 U.S. at 249-50.

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[49] Outside the context of this case, the Department of Justice has relied on *Viviano* in stressing that the meeting competition defense is extremely difficult to establish. *Dep't. of Justice Report on the Robinson-Patman Act* 23-27 (1977).

[50] The court in *Wall Products Co.* v. *National Gypsum Co., supra*, dealt with a similar argument: "In the course of litigation it is at times expedient for one party to assert that the other parties took too seriously their obligation to comply with a statute, and that their compliance policies went beyond the required minimum. But that kind of argument . . . comes down to nothing more than the assertion that if plaintiffs had been running the defendants' business they would have elected to be less responsible in their compliance policies." 326 F.Supp. at 313, n.10.



As noted by the Court of Appeals, the Government's alternatives would eliminate the section 2(b) defense and be ultimately anticompetitive:

> ". . . the Government's alternatives would eliminate the section 2(b) defense. This, it seems to us, would be more likely to put a floor under prices than to induce wholesale cutting, since a firm in a concentrated industry would be unlikely to reduce prices across the board simply to close a single sale. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 181 (1955). And it is through isolated price reductions that established price levels are eroded, precipitating widespread price cuts. P. AREEDA, [ANTITRUST ANALYSIS (1974)], at 231. The Government's position, then, would induce greater price rigidity." Pet. App. 21a-22a, 550 F.2d at 124.

Although the Government now asserts that the Court of Appeals' analysis was "wrong" (Gov. Br. 90), the Attorney General's Committee Report and Professor Areeda's work demonstrate that the view of the Court of Appeals is supported by a Government-sponsored committee, and by a commentator upon whom the Government's brief relies (Gov. Br. vii). The economic validity of the Government's "pricing through ignorance" theory (Gov. Br. 91-92 including n.83) is refuted by these authorities relied on by the Court of Appeals,[51] and the validity of the theory as a legal proposition was rejected by this Court in *Maple Flooring Mfrs.' Ass'n* v. *United States, supra*, 268 U.S. at 582-83 (see *supra*, 23-24).

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[51] From an economic standpoint, the Government's argument is too simplistic. As one example, it ignores the fact that costs vary among sellers and, therefore, that an efficient seller has an incentive to acquire more business by making a lower price offer which other sellers are unwilling or unable to meet. Indeed, if an efficient seller knows that his competitors may lawfully, through verification, meet somewhat lower price offers, that efficient seller then has all the more incentive to reduce his own prices even further to a level which his competitors will not or cannot economically meet, though they would be legally entitled to do so. For other examples, see R. Posner, *The Robinson-Patman Act, Federal Regulation of Price Differences* 12-15 (1976).

The plain fact is that, by confirming doubtful reports of competitive offers, verification in many cases makes possible price-cutting which otherwise would be prohibited under the Robinson-Patman Act (I A. 364, II A. 584, 755-60). Such "sporadic" price cutting, according to yet another commentator upon whom the Government's brief relies (Gov. Br. viii), results in generally lower prices "much more quickly than reluctant, delayed, across-the-board price cuts," because if a seller "had to cut price to everyone to get [a] new customer, the price would not be cut." R. Posner, *The Robinson-Patman Act, Federal Regulation of Price Differences* 14 (1976).

The only time verification does not result in price cutting is when doubtful reports of competitive offers cannot be confirmed. In these circumstances, any resulting price stability is an inevitable consequence of the Robinson-Patman Act and would occur even if verification does not take place. Similarly, to the extent a seller's "matching" of competitive offers can be characterized as leading to price stability (see Gov. Br. 91), this result is again an inevitable consequence of the Robinson-Patman Act's "meet but don't beat" rule. Clearly, as the Department of Justice has expressly stated in other forums, the Government's complaint about price stabilization is really directed at the consequences of the Robinson-Patman Act, and not at the results of respondents' verification.[52]

Thus, the Government has offered no viable solution for respondents' desires to remain competitive while complying with the Robinson-Patman Act, particularly one which has any

[52] The Department of Justice's own recognition of the *inherent* stabilizing effects of the Robinson-Patman Act has led Department spokesmen to call for its repeal. *Department of Justice Report on the Robinson-Patman Act* 40-58 (1977); Testimony of Joe Sims, Special Assistant to the Assistant Attorney General, Antitrust Division, before the House Committee on Small Business, Subcommittee on Activities of Regulatory Agencies, p. 14 (July 10, 1975); Prepared Remarks of Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division, before the Legal Committee of the Grocery Manufacturers of America, p. 19 (October 29, 1975)(reported in part in CCH Trade Reg. Rep. #202, November 11, 1975, pp. 5-7).



relevance to this criminal prosecution. This is not a hypothetical difficulty. Contrary to the superficial characterization of the record furnished to this Court by third parties (*see* California *Amicus* Brief 10), respondents here have faced potential prosecution by the Federal Trade Commission for alleged price discrimination, as well as severe threats of treble damages, including specific private lawsuits involving price discrimination claims (I A. 60, IV A. 1923-28, 1942-47, 1948-53, 1954-70; Ev. H. Tr. 301-02). The decisions in *Staley* and *Viviano* thus amply justified respondents' occasional reliance on verification to ensure compliance with the Robinson-Patman law. *See Wall Products Co.* v. *National Gypsum Co.*, 326 F.Supp. at 313 n.10. In analogous circumstances, the Tenth Circuit has held that such direct verification with competitors is required (*compare* Gov. Br. 87 n.78):

> "By seeking verification Texaco was simply complying with the *requirements* laid down in Federal Trade Commission v. A. E. Staley Manufacturing Co. ... That is, Texaco was attempting to confirm the reports of its retail outlets that their competitors had lowered their prices. This much would be *necessary* before Texaco could lower its prices and still be within the 'meeting competition' defense." *Belliston* v. *Texaco, Inc., supra*, 455 F.2d at 182 (emphasis added).

Therefore, this Court should not impose criminal liability upon respondents for efforts to comply with the Robinson-Patman Act.

### C. Respondents' Efforts To Avoid Customer Fraud Were A Further Lawful Purpose For Verification.

The Government correctly observes that Robinson-Patman Act compliance was not the sole purpose for all verification by all respondents (Gov. Br. 94). On some occasions, some respondents had the additional purpose of avoiding customer fraud, frequently in connection with the extension of "job price

protection," a gypsum industry practice virtually identical to the "job contracts" which motivated the lawful information exchanges in *Cement Mfrs. Protective Ass'n* v. *United States*, *supra*, 268 U.S. at 594-96.[53] Substantial evidence concerning this additional lawful purpose for verification was adduced at trial (see *supra*, 13).

Relying on the authority of *Cement* and *Wall Products Co.* v. *National Gypsum Co.*, *supra*, 326 F.Supp. at 315,[54] respondents requested jury instructions at trial on the lawfulness of verification for the purpose of preventing customer fraud (Def. Req. Final Inst. 29, IV A. 1858-59; Def. Supp. Req. 16, IV A. 1915; and 19, IV A. 1916).[55] However, the trial judge's extemporaneous delivery of the final charge omitted any reference to the relevance of customer fraud. When this significant

[53] Gypsum producers sometimes guaranteed a price quotation for a quantity of gypsum board against price increases which might occur during the course of a lengthy construction project. These guarantees were called "job price protection." Customers sometimes misrepresented to other suppliers that they had not received such protection and thus received two or three times the volume of wallboard actually required for the particular job at lower "protected" prices guaranteed by several suppliers. As a result of such fraudulent misrepresentations, the customer was able to secure wallboard at reduced prices from different suppliers and then secure a competitive advantage over those suppliers' other customers by misdirecting the lower priced wallboard to other jobs (I A. 316-17, III A. 1402-03, 1428-29).

[54] Referring specifically to verification in the gypsum industry, the *Wall Products* court held that "[e]ven if there were no Robinson-Patman Act, the limited price verification of defendants would be completely within the *Cement Manufacturers* exception to *Container* .... No court is required by the Sherman Act to foster 'competition' procured by fraud and misrepresentation, and the Sherman Act does not prohibit a defendant from protecting itself therefrom." 326 F. Supp. at 315.

[55] Respondents' Supplemental Request 19 (IV A. 1916) stated:

> "Sellers may lawfully contact competitors to confirm or verify a report of a lower price or price quotation to a customer even if the effect of such contacts is to stabilize or increase prices provided the purpose of such contacts is to protect the sellers against misrepresentations of the customers as to the prices they are being quoted or charged."



omission was called to the court's attention, after the charge was completed (IV A. 1754), the trial judge limited his "correction" to a grudging, inadequate description of the issue which passed off a fifty-year old principle of the Sherman Act, set forth in *Cement*, as a mere lawyer's "contention" to be given such weight as the jury desired without any guidance whatsoever as to its legal significance:

> "I want to say that in connection with verification either as to job protection arrangements or price, the Defendants contended there were two purposes, not just one. One purpose they contended for was that it was a defense to the Robinson-Patman Act. The other they contended was to avoid being defrauded. If they had any other contentions you heard them set forth by counsel. If counsel told you what their contentions are and they differed in any way from mine, they know what their contentions are better than I know what their contentions are, so you take their statements of the contentions" (IV A. 1764).

Respondents vigorously argued this error in the jury instructions to the Court of Appeals,[56] but that court's opinion concentrated on the more extensively argued and more generally applicable Robinson-Patman purpose for verification, and failed to deal with respondents' arguments concerning customer fraud.[57] The result was that the Court of Appeals fashioned a jury instruction concerning information exchanges which did not address the relevance of a lawful purpose to avoid customer fraud (Pet. App. 28a-29a, 550 F.2d at 126). However, this does not mean that respondents were not entitled to reversals of the verdict as the Government contends (Gov. Br. 93-95).

[56] *See* App. Jt. Br. at 18, 20, 29-30, 38-41, 58-59; App. Jt. Rep. Br. at 16-17.

[57] The Court of Appeals incorrectly understood that "Appellants insist that the only purpose of the calls was to ensure compliance with the Robinson-Patman Act" (Pet. App. 12a, 550 F.2d at 120) and, apparently on this basis, concluded that "Here, fraud is not at issue" (Pet. App. 19a, n. 9, 550 F.2d at 123, n.9).

Rather, this Court should hold that on remand respondents are entitled to an instruction stating, consistent with the rule of *Cement*, that the desire to avoid the perpetration of customer fraud can also be a lawful purpose for information exchanges under the Sherman Act.

The Government attempts to distinguish this case from *Cement* by arguing that *Cement* "involved only exchanges of information about sales contracts closed prior to the exchange," whereas this case allegedly "deals with exchanges on open transactions . . ." (Gov. Br. 83 including n. 75).[58] This argument is not based on a valid factual distinction between this case and *Cement*.

The "transactions" subject to verification here were no more "open" than those in *Cement*. The *Cement* "job contracts" were treated as "free options" which did not legally bind a purchaser to buy any cement from a manufacturer. 268 U.S. at 594-95. The critical information exchanged in *Cement* was a manufacturer's offer to supply cement to a customer for *future* delivery at a particular price if that customer so desired, including the "fullest information" regarding "all changes in the contract" and any "increases in the amount of cement to be delivered and cancellations." 268 U.S. at 596. The *Cement*

[58] In the Court of Appeals the Government made a different argument that gypsum buyers' oral misrepresentations concerning alleged competitive offers were not "legal" fraud. *See* App. Jt. Rep. Br. 16. The Government's abandonment of this argument in this Court is undoubtedly due to the fact that it is unsound. Under long established common law principles, a buyer's written or oral misrepresentation as to prices offered by a seller's competitor constitutes actionable fraud. *Smith, Kline & French, Co.* v. *Smith*, 166 Pa. 563, 31 A. 343 (1895); *see also, Moline Plow Co. of Kansas City* v. *Casron*, 72 Fed. 387 (8th Cir. 1895); *Lear* v. *Bawden*, 75 Colo. 385, 225 P. 831 (1924); *Rimling* v. *Scherper*, 206 Wis. 532, 240 N.W. 159 (1932); *Stuart* v. *Lester*, 1 N.Y.S. 699 (1888). Moreover, criminal liability in this and other cases should not hinge on an after-the-fact, frequently technical evaluation of whether a particular representation is "legally actionable" or "void" under the law of different jurisdictions.



"transactions" were "closed" only in the sense that the offers had already been made when reported, but this was also true of the competitive offers verified in this case (see *supra*, 11, and n.53).

Most importantly, it was for the jury, not the trial judge or the Government, to decide whether respondents' evidence brought their verification within the *Cement* rule. Respondents were thus entitled to an accurate instruction that the prevention of customer fraud was a lawful purpose for verification.[59] The trial judge's characterization of an established Sherman Act principle as a mere "contention" of respondents' counsel prevented the jury from considering respondents' evidence on this issue.

[59] A criminal defendant is entitled to specific instructions on his theory of defense if there is evidence to support it and proper requests to charge are made. *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969); *United States* v. *Young*, 464 F.2d 160, 164 (5th Cir. 1972); *Salley* v. *United States*, 353 F.2d 897, 898 (D.C. Cir. 1965); 2 Wright and Miller, Federal Practice and Procedure § 482, p. 179 (1969). The failure so to charge is reversible error, *United States* v. *Leach*, 427 F.2d 1107, 1112 (1st Cir. 1970), because, "[i]n effect, the trial judge directs a verdict on that issue against the defendant," *Strauss* v. *United States*, 376 F.2d 416, 419 (5th Cir. 1967).

**D. The Instruction To Presume An Unlawful Purpose For Verification Was Erroneous Because The Theory Of The Offense Charged In The Indictment and Litigated At Trial Made An Unlawful Purpose A Central Element Of The Crime Alleged.**

The indictment charged that verification was only one of thirteen means of "effectuating the . . . combination and conspiracy," the central purpose of which was to "raise, fix, maintain and stabilize the prices of gypsum board" (I A. 34-35). The Bill of Particulars stated that respondents' verification was done for the express "purpose of raising, fixing, maintaining and stabilizing prices of gypsum board and increasing profits," and charged that verification "assisted [respondents] in making uniform pricing decisions. . . . It was also a means to achieve and maintain price increases and to increase profits. In addition, it served as a policing activity to ascertain whether the conspirators were adhering to the uniform prices and terms and conditions of sale . . ." (I A. 37-38). In short, a wilfully unlawful purpose for verification was a central element of the offense charged in the indictment (see Gov. Br. 5, 71).

During the trial, the Government continued to acknowledge that the nature of respondents' purpose in verifying was critical in determining whether verification was lawful or unlawful. The prosecutor emphasized that this prosecution was not a mere *"Container"* price-exchange case, but rather was directed at alleged "garden variety" price-fixing (Tr. 8027-29). Likewise, in his closing argument the prosecutor never argued that respondents' purpose for verification was irrelevant. Instead, consistent with the theory of the indictment and the Government's case as tried, the prosecutor argued that "there was a complete and full exchange of pricing information for the purpose of fixing, maintaining and stabilizing prices," and that respondents' claims of lawful purposes were a "sham conjured up for this case" (IV A. 1629-30; 1688). The Government then



requested a jury instruction which stated that respondents' purpose for verification was an issue for jury determination under the Government's theory of the case (see *supra*, 19).

Thus, the theory of the offense charged in the indictment and litigated at trial made an unlawful purpose for verification a necessary element of the crime. *United States* v. *Cluck*, 542 F.2d 728, 731 n.2 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976). But the trial court's verification instruction eliminated the need for the Government to prove unlawful purpose in order to convict (see *supra*, 20-21), and thereby impermissibly expanded the scope of the offense charged in the indictment and litigated at trial. This was reversible error. *Stirone* v. *United States*, 361 U.S. 212, 215-19 (1960), *quoting Ex Parte Bain*, 121 U.S. 1, 10 (1887); *United States* v. *Smolar*, 557 F.2d 13, 17-19 (1st Cir. 1977). Since the effect of the trial court's verification instruction, which was repeated after the jury retired to deliberate (*supra*, n. 31), was to amend the indictment without participation by the grand jury, respondents, like the defendant in *Stirone*, "could have been convicted on a charge the grand jury never made against [them]." 361 U.S. at 219. Such judicial usurpation of the grand jury's function is prohibited. *Russell* v. *United States*, 369 U.S. 749, 770-72 (1962).

In addition, since "purpose" was a necessary element of the offense charged in the indictment and tried in the district court below, the Government undertook the burden of proving beyond a reasonable doubt that respondents' verification was for an unlawful purpose. *In re Winship*, 397 U.S. 358 (1970); *Davis* v. *United States*, 160 U.S. 469, 493 (1895); *see United States* v. *Nu-Phonics, Inc.*, 433 F.Supp. 1006, 1012-13 (E.D. Mich. 1977). Accordingly, the erroneous instruction that it was to be "presumed, as a matter of law" that respondents' purpose in verifying was unlawful if the effect of verification was to stabilize prices was especially prejudicial. Both the Due Process Clause and the guarantee of a trial by jury flatly preclude a

"presumption of guilt" by instructing the jury to presume a central element of the criminal offense charged in the indictment. *See Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *see also Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973). Similarly, reliance on an irrebuttable presumption is unconstitutional when its effect is to preclude consideration of evidence negating liability in a criminal prosecution. *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932); *United States* v *Bowen*, 414 F.2d 1268, 1273 (3rd Cir. 1969).

To support the trial judge's erroneous verification instruction, the Government argues in this Court, as it must, that respondents' purpose for verification was irrelevant. This argument is inconsistent with the theory of the offense as litigated by the Government at trial. The Government cannot cure the variance between the indictment and the instructions by shifting position and arguing on appeal that the trial judge's instructions were right all along. *United States* v. *San Juan*, 545 F.2d 314, 318 (2nd Cir. 1976); *see also Russell* v. *United States*, *supra*, 369 U.S. at 766-68.[60] Nor is it proper for the Department of Justice now to transform this criminal prosecution into an attack on the Robinson-Patman Act heretofore carried out in Congress (see *supra*, 38). This is all the more true since, as shown next, the Government's new theory has not been clearly articulated even at this late date.

**E. This Court Should Not Impose Criminal Sherman Act Liability On The Basis Of An Unclear Theory Supported Only By Doubtful Economic Arguments Which Are Irrelevant To The Facts Of This Case.**

The Government's brief fails to articulate clearly the legal standard by which it claims respondents' verification should be judged. Thus, the Government concedes that the lawfulness of information exchanges cannot be judged by a *per se* rule (Gov. Br. 76, 83 n.75), and points out that some exchanges are pro-

[60] Even in civil cases a party may not change his position on appeal. *Capps* v. *Humble Oil & Refining Co.*, 536 F.2d 80, 81-82 (5th Cir. 1976); *Browzin* v. *Catholic University of America*, 527 F.2d 843, 849 n.10 (D.C. Cir. 1975); *United States* v. *Commanding Officer*, 446 F.2d 124, 125 (8th Cir. 1971).



competitive (Gov. Br. 75-76). On the other hand, the Government's argument that exchanges with "an effect on prices" are automatically illegal regardless of their purpose (Gov. Br. 76) means that information exchanges also cannot be judged by the "rule of reason," because a rule of reason analysis would involve a consideration of purpose (see *supra*, 21-22).

Rather than setting forth a well-defined, precedent-based standard for evaluating the lawfulness of information exchanges, the Government instead attempts to support its position in this case by asserting that economic theory holds "information exchanges are most detrimental to free competition when several conditions coalesce," and by proceeding to list seven alleged "conditions" which supposedly made respondents' verification a criminal violation (Gov. Br. 77-79). Although the Government attempts to "tie-in" its seven "conditions" to the facts of this prosecution with *"supra"* references to its Statement of the Case, the conditions enumerated by the Government were never specifically placed in issue and litigated at trial and, under the final charge, the jury was not required to find any of the conditions as a predicate for a guilty verdict. Therefore, the Government's "economic" arguments are entirely hypothetical and unrelated to any "facts" necessarily considered, much less actually found, by the jury.[61]

Hypothetical arguments based on economic theory are clearly inappropriate reasons for imposing antitrust liability, particularly in criminal cases. See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927); *International Harves-*

[61] The Government is forced to rely on abstract economic theory because it cannot rely on the economic evidence in the record. In preparation for trial, the prosecution retained as an economic expert Dr. Richard A. Miller, who spent many months on leave from his professorship working at the prosecution's head office studying the gypsum industry (II A. 800). Dr. Miller did *not* find any market behavior indicative of collusion, and did *not* provide any analysis or study of any economic data from which he believed even an inference of conspiracy might be drawn (Tr. 7144-7221; 7243-50; 13,460-70; 13,472-569; 13,576-709; 13,713-31).

*ter Co.* v. *Missouri*, 234 U.S. 199, 222-23 (1914). In the words of a leading commentary on the antitrust laws co-authored by a former head of the Antitrust Division, "There is more than a little merit in the complaint that criminal sanctions are inappropriate for those areas of antitrust law where violations depend on essentially economic judgments on which reasonable Supreme Court justices may and do differ." C. Kaysen and D. Turner, *Antitrust Policy*, 256 (1959). This observation applies with even greater force to the present case in view of the fact that the seven hypothetical economic "conditions" listed in the Government's brief are an unworkably vague and unfair basis for imposing criminal liability for information exchanges. A businessman cannot reasonably be expected to predict whether a court may subsequently rule that, as a matter of law, his industry is too "concentrated" (Gov. Br. 77), the demand for his product is too "inelastic" (Gov. Br. 77-78), or entry by new producers "takes a long time" (Gov. Br. 78).

Moreover, the Government's arguments regarding economic theory are unsound because they are based upon an outdated and fallacious suspicion that "oligopolistic markets" are for some reason inherently suspect. To begin with, economists themselves do not agree on what an "oligopolistic market" is, or on any coherent theory which really explains how pricing is arrived at in an oligopoly.[62] Furthermore, recent research has demonstrated empirically that there is no necessary correlation between industrial concentration and price stability. For example, Professor Weiss has concluded that "neither concentration nor corrected concentration is significantly related to price change. . . ." Weiss, "Stigler, Kindahl, and Means on Administered Prices," 67 *Am. Econ. Rev.* 610, 617 (1977). Similarly, research conducted by the Federal Trade Commission Bureau of Economics has proven the existence of "a statistically significant *positive* relationship between

[62] *See* John McGee, *In Defense of Industrial Concentration* 54-79 (1971); F. M. Scherer, *Industrial Market Structure and Economic Performance* 131 (1970).



the variability of price-cost margins and concentration," which has led to the conclusion that "any public policy proposal that is based upon conventional 'administered pricing' assumptions should be seriously questioned." P. David Qualls *Market Structure and Price-Cost Margin Flexibility in American Manufacturing, 1958-1970,* FTC Bureau of Economics Working Paper No. 1, p. 20 (March, 1977) (processed) (emphasis supplied).[63]

The foregoing empirical economic research disproving any alleged correlation between market concentration and price stability was strongly confirmed by the record in this case. The uncontradicted economic evidence showed widely varying prices and discounts among respondents and a "high degree of competition" that "verged on being disorderly" (see *supra*, 5-11). Thus, irrespective of "theory," prices were not stabilized in the gypsum industry in the statutory period.

In short, the Government's plea to adopt a rule imposing criminal Sherman Act liability in this information exchange case is not supported by the record, current economic theory, or legal precedent. Most importantly, the Government's argument is inappropriate because, as shown next, the rule requested is a new theory of liability which cannot be retroactively applied in this criminal prosecution to respondents' past conduct.

[63] *See also* Statement by Richard W. McLaren, Assistant Attorney General, *The 1970 Midyear Review of the State of the Economy*, Joint Economic Committee, Part 1, 91st Cong., 2nd Sess., 112 (1970); G. Stigler and J. Kindahl, "Industrial Prices, as Administered by Dr. Means," 63 *Am. Econ. Rev.* 717, 720 (1973); Weston and Lustgarten, "Concentration and Wage—Price Changes," in Goldschmid *et al.* (eds.), *Industrial Concentration: The New Learning* 307, 320 (1974); P. David Qualls, *Market Structure and Price Behavior in U.S. Manufacturing, 1967-1972*, FTC Bureau of Economics Working Paper No. 6 (March, 1977) (processed).

## II. DUE PROCESS PROHIBITS THE RETROACTIVE APPLICATION OF ANY EXPANSION OF CRIMINAL LIABILITY FOR INFORMATION EXCHANGES TO THE PRIOR CONDUCT OF THESE RESPONDENTS.

As respondents have shown in Part I, *supra*, prior to the trial of this case, no court had ever held that a mere exchange of information which had a stabilizing effect on prices violated the Sherman Act, regardless of the purpose for the exchange. On the contrary, every court to consider the legality of such exchanges had held that purpose was critical to a finding of liability, either because an unlawful purpose was a necessary element of the offense or because a legitimate purpose, such as preventing buyer fraud or complying with the Robinson-Patman Act, was a "controlling circumstance" which precluded liability. Thus, by eliminating unlawful purpose as an element of the criminal offense charged in this case, the trial court expanded the definition of that offense far beyond its former bounds, made it easier for the Government to convict these respondents after the fact, and imposed criminal liability for conduct not punishable under prior law. Py retroactively applying this judicially expanded definition of the crime to respondents' prior conduct, the trial court violated fundamental principles of fair notice embodied in the Due Process Clause.

"[T]he notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties . . . is fundamental to our concept of constitutional liberty." *Marks* v. *United States*, 430 U.S. 188, 191 (1977). In *Marks*, this Court held that its limiting construction of a "sweeping" obscenity statute could not be enlarged and applied retroactively because defendants had received "no fair warning" that their conduct was illegal. 430 U.S. at 195. At issue was the retroactive application of the new standard of obscenity announced in *Miller* v. *California*, 413 U.S. 15 (1973). The Court recognized that *Miller* was a "significant departure" from the narrower obscenity standard previously set forth in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), as interpreted by the



Courts of Appeal, and that defendants' due process rights would be violated if the *Miller* standard were applied to their conduct which predated that decision:

> "[T]he statute involved here always has used sweeping language to describe that which is forbidden. But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what that language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions. The effect is the same as the new construction in *Bouie*. Petitioners . . . had no fair warning that their products might be subjected to the new standards." 430 U.S. at 195 (footnotes omitted).

The defendants in *Marks* were therefore entitled to have the jury instructed under a standard which would judge their actions by the rule in effect at the time of their conduct.

*Marks* was an extension of the principle set forth in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, this Court held that the judicial enlargement of a criminal statute, if applied retroactively, deprives the accused of fair notice and due process of law because it operates precisely like an unconstitutional *ex post facto* law.[64] *See also United States* v. *Potts*, 528 F.2d 883, 886 (9th Cir. 1975).

This Court has defined an *ex post facto* law to include "[e]very law which alters the legal rules of evidence, and requires less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the

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[64] The Court's opinion stated:

> "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d Ed. 1960), at 58-59, must be applied to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." 378 U.S. at 354.

offender." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 385, 390, 1 L.Ed. 648 (1798); *see also Dobbert* v. *Florida*, 432 U.S. 282 (1977); *Malloy* v. *South Carolina*, 237 U.S. 180, 184 (1915); *Hopt* v. *Utah*, 110 U.S. 574, 589 (1884). This broad principle applies to any substantive change which eases the measure of proof necessary to convict, whether that change results from the diminution or elimination of an element of the crime, a shifting or easing of the prosecution's burden of proof, or the diminution or elimination of a defense.[65] The Government's proposed rule of law in the present case would improperly relax the measure of proof required to obtain Sherman Act convictions for respondents' information exchanges.

Like the obscenity statute in *Marks*, the sweeping language of the Sherman Act is vague and overly general without judicial clarification. Section 1 of the Sherman Act outlaws all agreements "in restraint of trade." 15 U.S.C. § 1 (1973). In the words of this Court:

> "Were § 1 to be read in the narrowest possible way, any commercial contract would violate it. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). The history underlying the formulation of the antitrust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 606 (1972).

In order to provide guidance for conduct in the face of Section 1's broad language, the courts have narrowed Section 1's sweeping prohibitions by limiting them to "unreasonable"

[65] In *Marks*, *supra*, 430 U.S. at 194-96 (1977), for example, this Court held that the prosecution's burden of proving lack of artistic merit could not be lessened retroactively in an obscenity case. Similarly, in *United States* v. *Williams*, 475 F.2d 355 (D.C. Cir. 1973), the court of appeals held that the burden of proof of insanity could not be shifted after the conduct occurred. *See also United States* v. *Henson*, 486 F.2d 1292, 1305-08 (D.C. Cir. 1973).



restraints of trade, and by identifying specific *per se* offenses which are outlawed regardless of their reasonableness. Thus, in the specific area of information exchanges, courts have instructed that exchanges for the purpose of complying with the Robinson-Patman Act or preventing customer fraud are lawful under the Sherman Act. Under this Court's decision in *Marks*, it follows that any retroactive application of a change in this rule which expands criminal liability for information exchanges would deprive these respondents of due process of law.[66]

Moreover, respondents would be deprived of fair notice even if this Court were to adopt the Government's assertion that *Container* would support a criminal conviction on a mere showing of an agreement to exchange price information which resulted in more stable prices (Gov. Br. 76). That interpretation of *Container*, which is contrary to the holdings of lower federal courts construing *Container* (see *supra*, 29-30), would represent a substantial expansion of criminal liability under the Sherman Act by eliminating the requirement of unlawful purpose set forth in *Maple Flooring, Cement, etc.* (see *supra*, 21-30). Due process therefore requires that any present "clarification" of *Container* can only be applied prospectively, and cannot be retroactively applied to respondents' conduct. At the very least, respondents would be entitled, on remand, to an instruction that would prohibit the application of any *Container* "clarification" to respondents' verification occurring prior to the date of the *Container* decision.[67]

The fundamental unfairness of applying a broad "clarification" of *Container* to respondents' pre-*Container* conduct is

[66] *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), is not to the contrary since that was a civil case which did not involve the retroactive application of an expanded definition of a criminal offense.

[67] When it became clear during the trial that the judge was going to charge the jury on an expansive misreading of *Container*, respondents tendered two instructions that pre-*Container* verification evidence should not be considered against any respondent (Watt Supp. Req., IV A. 1894; National Supp. Req., IV A. 1901). Neither instruction was given.

reinforced by the prosecution's own conscious decision to postpone grand jury proceedings against respondents in April of 1968 in the hope that "[a] favorable decision by the Supreme Court in the *Container* case may provide a convenient approach to the gypsum problem" (Ev. H. DX Q-13). In other words, the Government hoped that this Court might give it the new law it needed to prosecute these respondents after the fact.

Neither the trial court nor the Court of Appeals seemed to appreciate the serious problem of fair notice which permeated the trial and which threatens to invalidate any retrial of this case. The trial court brushed aside respondents' retroactivity contentions.[68] The Court of Appeals admitted that it was narrowing "the category of price exchanges that qualify as 'controlling circumstances' " under *Container* from prior federal appellate court decisions on the subject (Pet. App. 24a-26a, 28a; 550 F.2d at 125-26), yet apparently assumed that this expansion of a criminal offense could be applied on remand to conduct which predated the court's new rule by several years. Specifically, the Court of Appeals appeared to shift the burden of proof to respondents on the purpose issue (Pet. App. 28a, 50a, 550 F.2d at 126, 134; *see contra, United States* v. *Williams*, 475 F.2d 355 (D.C. Cir. 1973), and cases cited therein); did not refer to the avoidance of buyer fraud as a legitimate purpose for respondents' verification, contrary to *Cement* and *Container;* and set forth four narrowly limited rules for the evaluation of respondents' verification which no court had ever suggested before (see Pet. App. at 28a-29a; 550 F.2d at 126).[69] This insensitivity to the retroactivity problem could easily result in a retrial under a legal standard which this Court might then have to overturn on retroactivity grounds, necessitating yet a third trial.

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[68] See *supra*, n. 67.

[69] In light of the Court of Appeals' admitted establishment of "new law", the Government's suggestion (see Gov. Br. 93-94) that respondents should have anticipated and requested an instruction incorporating the Court of Appeals' unprecedented view of the law is frivolous.



Therefore, this Court should hold that on remand respondents are entitled to jury instructions on information exchanges which conform to the law existing at the time respondents' exchanges took place. *See United States* v. *Jacobs*, 513 F.2d 564, 567 (9th Cir. 1974). A proper statement of the relevance of Robinson-Patman compliance appears in a jury instruction already approved by the Court of Appeals for the Ninth Circuit (see *supra*, 20). Respondents are also entitled to an accurate statement of the lawfulness of information exchanges for the purpose of preventing customer fraud (see *supra*, n.55).

## III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE A PROPER CHARGE ON KEY CONSPIRACY LAW PRINCIPLES.

The potential vices of massive "continuing conspiracy" prosecutions are well recognized. *Krulewitch* v. *United States*, 336 U.S. 440, 445-58 (1949)(concurring opinion); *Kotteakos* v. *United States*, 328 U.S. 750, 776-77 (1946); *see also United States* v. *DeCavalcante*, 440 F.2d 1264, 1276 (3rd Cir. 1971). Remote events falling outside the statutory period may improperly become the basis for conviction, verdicts can be induced as a result of conduct for which the defendants should not properly be held accountable, and guilt may be predicated on offenses which vary or are separate from the actual offense charged. As the number of defendants, the number of specific episodes, and the volume of evidence within a single proceeding increases, the "spillover effect from testimony" increases the possibility of each type of prejudice. *United States* v. *Bertolotti*, 529 F.2d 149, 157 (2nd Cir. 1975).

All of these dangers were present in this case. The Government charged a 13-year nationwide conspiracy effectuated by 13 alleged "means and methods," and involving over 160 alleged co-conspirators.[70] The Government's own dis-

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[70] The Government alleged more than 160 co-conspirators in the Bill of Particulars, as successively amended.

cussion of the evidence (Gov. Br. 6-49) shows a hodgepodge of unrelated and even inconsistent events.[71] This evidence raised important issues as to whether, for example, the distant events regarding alleged predatory conduct in the Southwest in the early 1960's, the various 1965 pricing decisions, and the 1971 decision to stop using pallets in Michigan were in any way related and whether a participant in one of these events necessarily joined the single grand conspiracy charged.

In these circumstances, it was the trial court's obligation to guard against improper convictions by giving the jury adequate instructions so that it considered guilt or innocence only within the context of the substantive offense charged. Despite the timely submission by respondents of recognized and accepted conspiracy law instructions, the trial court, over proper objections by defense counsel, refused to give them (Pet. App. 35a-36a, 550 F.2d at 129).[72] Judge Hunter of the Court of Appeals found reversible error in this refusal (Pet. App. 29a-39a; 550 F.2d at 127-30), and Judge Adams agreed that the instructions which Judge Hunter's opinion requires should be used at the retrial (Pet. App. 50a, 550 F.2d at 134).

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[71] The Government argues, for example, that both meeting and not meeting the competition of single-plant producers was conspiratorial (Gov. Br. 26-27, 46). Similarly, the Government argues at various points that increasing, decreasing, and stable prices are all conspiratorial (Gov. Br. 25-27, 46, 67-68).

[72] The Government's reliance (Gov. Br. 96) on *United States* v. *Park*, 421 U.S. 658 (1975), is misplaced. *Park* was a relatively simple case on the facts, and this Court merely held that the trial judge did not abuse his discretion by refusing further "amplification" of an already adequate charge, particularly in view of the defendant's failure to request an instruction which "amplified" the charge in the manner contended for on appeal. 421 U.S. at 675-76. In the present case, however, the trial judge denied proper and timely requests, and the final charge as given both omitted a crucial point of law in this complex case (see *infra*, 57-61), and was wrong in its presentation of another important legal issue (see *infra*, 61-66).



### A. The Trial Judge Erred by Refusing to Instruct the Jury to Determine "Scope and Purpose" and to Consider It Separately as to Each Defendant.

Respondents requested an instruction which would have focused the jury's attention on the necessity of determining each respondent's understanding of the "scope and purpose" of any agreement which that respondent allegedly joined (Def. Supp. Req. 5, IV A. 1911).[73] Such an instruction was essential in this case to ensure that a respondent was not held liable for the activities of others to which that respondent was not "consciously" committed as a participant. *See Klein* v. *American Luggage Works, Inc.*, 323 F.2d 787, 791 (3rd Cir. 1963); *United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963).

Respondents, in submitting their proposed instruction, expressly relied on *United States* v. *Borelli*, 336 F.2d 376, 382-87 (2nd Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), later approved in *United States* v. *Bennett*, 409 F.2d 888 (2nd Cir. 1969), and *DeCavalcante, supra*, 440 F.2d at 1275; *see also United States* v. *Rosenblatt*, 554 F.2d 36, 39 (2nd Cir. 1977). In *Borelli*, the court held that where, as here, the statute of limitations is an important issue, a jury instruction on each defendant's understanding of the scope of an alleged conspiracy is required. 336 F.2d at 384-86.

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[73] Defendants' requested instruction read as follows (IV A. 1911):

"Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant. Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment of the common agreement or understanding, if any, to which you may find him or it a party."

The prosecution's evidence as to one defendant in *Borelli* was substantially limited to the pre-statutory period, and the Government sought to hold him responsible for acts of his former confederates occurring within the statutory period. Unlike the trial judge in this case, the *Borelli* trial court had even instructed the jury that "proof of several and independent conspiracies involving various of the defendants *** is not proof of the single conspiracy charged ***." *See* 336 F.2d at 382 (omissions in original).[74] However, the final charge was nevertheless deficient because it still permitted the jury to conclude that once an overall conspiracy was found as to some defendants, all of the defendants were automatically connected to that conspiracy by their involvement in one of the minor agreements allegedly part of it. As Judge Hunter held, the final charge in this case also contained this defect because it "failed to emphasize that joining a subsidiary agreement would not constitute guilt unless it was done with the intent to join the overall conspiracy" (Pet. App. 32a; 550 F.2d at 128).[75]

The failure to give a *Borelli* instruction was especially prejudicial in this case. Here, as in *Borelli*, the limitations bar was jeopardized by the prosecution's concentration on evidence in the pre-statutory period. As Judge Hunter pointed out:

> "Over a period of five months, the Government introduced masses of evidence concerning a multitude of seemingly unrelated events and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing conditions of gypsum wallboard. Most of this evidence dealt with actions prior to the start of the applicable limitations period." Pet. App. 29a-30a; 550 F.2d at 127.

[74] The *Borelli* trial court's instruction was in essence a "*Kotteakos*" charge. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946). Respondents here submitted a similar instruction in a form patterned on that given in *United States* v. *Johns-Manville Corp.*, Cr. 21-118 (E.D. Pa. 1962), *ABA Jury Instructions in Criminal Antitrust Cases*, 482 at 512-14 (1965). See Def. Supp. Req. 3, IV A. 1910; Def. Req. Final Inst. 4, IV A. 1843-44; 7 (¶ "Third"), IV A. 1845; 38, IV A. 1862; and 39, IV A. 1862-63. The trial judge's failure to give these instructions despite having informed defense counsel that he would give Def. Req. Final Inst. 7 (Paragraph "Third"), 38 and a portion of 39 (IV A. 1644, 1650), constitutes additional grounds for a new trial.

[75] The Government's argument (Gov. Br. 98 n. 88) that respondents failed to request an instruction which used the precise words of Judge Hunter quoted above is frivolous. As Judge Hunter's opinion makes clear, the above language was merely his formulation of the rule set forth in *Borelli*.



The other factor which caused concern in *Borelli* was also present in this case. As Judge Hunter correctly observed, "[e]ach of the [respondents] was . . . connected by the evidence only to a few of the dozens of allegedly conspiratorial episodes" (Pet. App. 34a; 550 F.2d at 128),[76] which made it "essential" to impress upon the jury that any one respondent was guilty of the overall conspiracy charged only if such an overall conspiracy "was within [a respondent's] reasonable contemplation when he engaged in any of the isolated activities" (Pet. App. 30a, 550 F.2d at 127).

These factors led Judge Hunter to conclude that:

> "In these circumstances, it was necessary specifically to inform the jury that any particular defendant could be found guilty of conspiracy only if he understood that he had joined the single, overall agreement charged in the indictment; participation in any of the subsidiary events was not enough." Pet. App. 30a; 550 F.2d at 127.

The trial judge's failure to focus the jury in this manner was reversible error.

The Government, pointing to isolated fragments sprinkled about the charge, such as the routine instruction to determine each defendant's guilt or innocence separately, attacks Judge

[76] For example, Judge Hunter was troubled by the fact that although respondent Brown had been convicted of the monolithic conspiracy charged in the indictment, the evidence only connected him to the 1965 price increase and the 1966 credit change, and "it does not follow [that this participation] . . . means that he associated himself with an overall conspiracy to stabilize prices beginning before 1960 and lasting until 1973" (Pet App. 33a-34a, 550 F.2d at 128).

Hunter's conclusion by asserting that the jury received an adequate "scope and purpose" instruction (Gov. Br. 97-98). This argument overlooks *Borelli's* recognition of the fact that in conspiracy cases a "court *always* charges" in this manner, but that these routine instructions, standing alone, are insufficient to focus the jury on the question of the scope of each defendant's agreement. 336 F.2d at 385-86, including n.4 (emphasis added). Under *Borelli*, the jury must also be told in specific terms that a respondent cannot be held liable for what another conspirator did beyond the reasonable scope of any agreement as that respondent understood it. The fragments of the charge relied upon by the Government, even collectively considered, did not satisfy this requirement of *Borelli*.

The Government's second line of attack on Judge Hunter's holding is an attempt to distinguish this case from *Borelli* on the ground that here "[t]here was either one overall agreement or none, and the subsidiary episodes of price-fixing . . . could not have taken place without an umbrella agreement or understanding" (Gov. Br. 99).[77] This bald assertion has no apparent logic, is unsupported by any authority, and is contradicted by the Government's own "Statement of the Case," which is littered with unrelated events involving different respondents, different time periods, and different parts of the country. Each of these events, many of which the Government itself describes

[77] Contrary to the Government's argument, *United States* v. *Salazar*, 485 F.2nd 1272 (2nd Cir. 1973), *cert. denied*, 415 U.S. 985 (1974), and *United States* v. *Guanti*, 421 F.2d 792 (2nd Cir.), *cert. denied*, 400 U.S. 832 (1970), did not limit *Borelli* "to its facts" (Gov. Br. 98 n. 89). Both of those cases merely held that a *Borelli* instruction was not absolutely required for "core" members of a conspiracy and, therefore, are distinguishable from the present case on their facts. Also clearly distinguishable are *Blumenthal* v. *United States*, 332 U.S. 539 (1947), which involved "unique facts" and no statute of limitations problem, and *United States* v. *Abraham*, 541 F.2d 1234 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977), in which the evidence clearly showed a single, ongoing conspiracy, and which specifically warns that the "decision in this case should not be read as discouraging the giving of an instruction when the possibility of variance clearly exists." 541 F.2d at 1239.



as "subsidiary agreements" (Gov. Br. 20), could have occurred without any "umbrella" agreement. Thus, even the Government's own description of the record shows that *Borelli* is not distinguishable from the present case on the basis of any relevant facts. The trial judge below thus erred by not giving a *Borelli*-type scope and purpose instruction.

**B. The Trial Judge's Withdrawal and Abandonment Instruction Erroneously Prevented the Jury from Considering Evidence of Vigorous Price Competition.**

Where a continuing conspiracy is alleged, each defendant who has completely disassociated himself from the conspiracy through some affirmative action prior to the commencement of the limitations period is entitled to acquittal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *see also Pinkerton* v. *United States*, 328 U.S. 640 (1946); *Local 167* v. *United States*, 291 U.S. 293, 298 (1934). Respondents' requested instruction on the withdrawal issue recognized that affirmative action was required, and left it to the jury to determine whether evidence such as the resumption of vigorous competitive behavior was sufficient to conclude that the requisite affirmative action had been taken (Def. Req. Final Inst. 25, IV A. 1856).[78] The trial court not only rejected the defense request, but also narrowly limited the jury's consideration to just two precise methods of

[78] The Government suggests that this requested instruction was inadequate because it failed to draw a distinction between competition against single-plant producers and competition among major producers (Gov. Br. 102 n.90). However, respondents specifically objected to the charge after it was delivered on the very grounds asserted as error (IV A. 1757). This was sufficient to preserve the point for review, regardless of any previous requests for charge. See Fed. R. Crim. P. 30. Moreover, as Judge Hunter held, respondents' requested instruction was also sufficient to draw "the court's attention to the improperly narrow scope of the charge actually given" (Pet. App. 38a n.15, 550 F.2d at 130 n.15). Finally, in view of the overwhelming, unrebutted evidence that competition in 1968 and thereafter was primarily among respondents, and was *not* solely directed at single plant producers, the Government's proposed "distinction" regarding single-plant producers has no foundation in the record (see, *supra*, 6).

communicating withdrawal, neither of which encompassed the respondents' theory:

> "To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials" (IV A. 1732).

The wealth of evidence inconsistent with the continuation of any conspiracy into the statutory period made it essential for the trial judge to give a proper instruction on "withdrawal and abandonment." The injustice resulting from the denial of respondents' requested instruction and the court's subsequent charge is further highlighted by the earlier finding of Judge Zirpoli in *Wall Products* that "by January 1, 1968, all defendants had abandoned and withdrawn from the conspiracy" which he had found among certain gypsum manufacturers by applying a civil standard of proof. 326 F. Supp. at 328. Judge Zirpoli's finding of withdrawal and abandonment was based principally on evidence of widespread discounting which was not nearly as extensive as the evidence of discounting in this record. Here, G-P, which was not a defendant in *Wall Products*, concentrated much of its defense on the fact that when its distribution division acquired full responsibility for marketing gypsum products in 1967-68, it combined aggressive tactics with independent branch pricing authority to capture increased sales and market penetration. Each corporate respondent reacted vigorously to the aggressive discounting G-P had fostered. See *supra*, 7. As a result of this competitive activity, price competition in the gypsum industry immediately prior to and throughout the statutory period was "rampant," and the gypsum market "verged on being disorderly" (see *supra*, 9-10).

In addition to the evidence of vigorous competitive activity, by the beginning of the statutory period the largest gypsum producers had stopped verifying with each other, thus eliminating the "means" through which the Government contends the conspiracy was accomplished and policed (Gov. Br. 10-12). USG and Watt stopped verifying prior to the statutory period, while National stopped verification at the outset of the statutory period (see *supra*, 11-12). The result of the discontinuation of verification by USG and National was that not a single verification contact was shown to have occurred among the three largest producers in the industry within the statutory period. The significance of this fact is demonstrated by the Government's own theory that the conspiracy charged in this case "depended upon the participation of *all* respondents; if any major producer had withdrawn, price maintenance would have been impossible" (Gov. Br. 99, emphasis added). Therefore, a proper withdrawal and abandonment instruction was clearly necessary.



Withdrawal from a conspiracy can be accomplished by the "communication of the abandonment in a manner reasonably calculated to reach co-conspirators," *United States* v. *Borelli*, *supra*, 336 F.2d at 388, regardless of the form or method by which withdrawal is communicated. In *Borelli*, the court held that a statement by the accused to one other co-conspirator, together with evidence of limited contact between the two, raised an issue for the jury to determine whether withdrawal had occurred. Similarly, in *United States* v. *Goldberg*, 401 F.2d 644, 649 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969), a member of the brokerage firm cited for illegal activities, who left the firm before the statutory cutoff date, was held to have effectively withdrawn from the conspiracy even though he did not "affirmatively notify" each co-conspirator or disclose the scheme to law enforcement officials.

Other cases agree that "withdrawal" is not a narrow concept established only upon proof of precise affirmative acts. In *Buhler* v. *United States*, 33 F.2d 382 (9th Cir. 1929), the court refused to impose a strict definition of withdrawal, and held that circumstantial evidence of withdrawal was sufficient:

> "The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and *we see no reason why the withdrawal should not be held susceptible to proof of the same character.* It might, of course, be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence." 33 F.2d at 384 (emphasis added).

Later, in *Marino* v. *United States*, 91 F.2d 691 (9th Cir. 1937), the court, relying on *Buhler*, held that affirmative action constituting withdrawal could be shown "by conduct wholly inconsistent with the theory of continuing adherence." 91 F.2d at 698.

The foregoing authorities demonstrate that any record facts inconsistent with respondents' continued participation in the alleged conspiracy would have been relevant to the jury's consideration of withdrawal and abandonment in the present case. This includes evidence that some respondents stopped verification, since ceasing to furnish price information is inconsistent with continued participation in a "price exchange" conspiracy. *Cf. United States* v. *Container Corp.*, 393 U.S. 333, 335 (1969). Also relevant is evidence of respondents' statutory period price competition, since it is obvious that a withdrawal from a "price-fixing" conspiracy can be communicated by the resumption of competitive price discounting. *See, e.g., Wall Products Co.* v. *National Gypsum Co., supra*, 326 F. Supp. at 327-28.

The trial court ignored these sound principles and gave a narrow instruction which prevented the jury from considering respondents' substantial evidence of withdrawal and abandonment. By failing to instruct on respondents' theory of withdrawal and abandonment, the trial judge in effect directed a verdict against respondents on this critical issue and therefore committed reversible error. *United States* v. *Leach*, 427 F.2d 1107, 1112 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970);



*Strauss* v. *United States*, 376 F.2d 416, 419 (5th Cir. 1967); see *supra*, n.59.

The Government does not contest that withdrawal from a price-fixing conspiracy can be accomplished by renewed price competition, but instead argues that the trial court's instruction on abandonment "encompassed respondents' theory of withdrawal by competition" (Gov. Br. 102). This assertion is not true, as vividly demonstrated by the trial court's ruling on respondents' requested withdrawal/abandonment instruction:

> "Mr. McSweeney: Your Honor, may I inquire that you would give the part [of Def. Req. Final Inst. 25; IV A. 1856] which says 'Resumption of competitive behavior,' such as intensified price cutting, or . . .
>
> "The Court: No, I will not give that. I think that's an improper statement of law. I am not going to say that" (IV A. 1647; *see also* IV A. 1757).

The court's generalized introductory comment regarding abandonment through "affirmative action" in the final charge was limited by the subsequent sentence defining "affirmative action" as requiring that "a defendant *either* must have affirmatively notified each other member of the conspiracy he will no longer participate . . . *or* he must make disclosures of the illegal scheme to law enforcement officials" (IV A. 1732, emphasis added). The fact that a general comment might have been included within the charge does not negate the impact of the specific instruction requiring the jury to consider only *two* possible means of withdrawal. *See Bihn* v. *United States*, 328 U.S. 633 (1946).

The Government also suggests that the trial court permitted the jury to consider respondents' theory of withdrawal and abandonment by allowing respondents' counsel to argue that resumption of competitive pricing constituted withdrawal (Gov. Br. 101). This argument ignores the fact that the court's subsequent instruction rendered respondents' arguments irrele-

vant. As Judge Hunter pointed out in his opinion, the opportunity to argue withdrawal to the jury "did not salvage [respondents'] rights . . . because the court in its subsequent charge told the jury that they *could not consider* [respondents'] theory" (Pet. App. 39a, 550 F.2d at 130, emphasis added).

## IV. THE TRIAL COURT'S INSTRUCTION OF THE JURY FOREMAN DURING A PRIVATE MEETING AND COERCION OF THE DEADLOCKED, ILL AND EXHAUSTED JURY REQUIRE REVERSAL OF THE VERDICTS.

The lack of evidence proving the conspiracy charged, together with the substantial evidence of vigorous price competition during the statutory period, produced a jury deadlock despite erroneous instructions and other prejudicial trial errors. The jury twice described its deadlock in unmistakable words. On the sixth consecutive day of sequestered deliberations, the jury reported itself so deadlocked that no juror would change his mind except "due to compassion for his fellow jurors" (IV A. 1835). On the following day the jury foreman again reported that the jury was so "hopelessly deadlocked" that the case was "not going to be settled by any document, any remembrance of testimony" (IV A. 1838-1839).

The jury was unable to reach a verdict on the basis of the evidence despite receiving four modified *Allen*-type or "dynamite" charges.[79] The last such charge was given in a private conference between the judge and the jury foreman, from which defense counsel were excluded. During this conference, the judge repeatedly told the foreman that the jury must keep deliberating and confirmed the jury's belief that he would not "accept" a deadlock, but wanted a "verdict one way or the other" (IV A. 1840). Following this private meeting, the trial judge erroneously impounded the transcript of the conference and gave a report to defense counsel on what had transpired which, in the words of Judge Adams of the Court of Appeals, was not "accurate or even substantially accurate" (Pet. App. 44a-45a; 550 F.2d at 132).

[79] Such a charge gets its name from *Allen* v. *United States*, 164 U.S. 492 (1896). Because of its coercive effect, the *Allen*-type charge is frequently described as a "dynamite" charge, particularly when it is used as a supplemental charge to "blast a hung jury into a verdict." *United States* v. *Fioravanti*, 412 F.2d 407, 419 (3rd Cir.), *cert. denied sub nom. Panaccione* v. *United States*, 396 U.S. 837 (1969).



On the basis of the foregoing facts, Judge Adams concluded that the trial judge improperly coerced the jury into returning verdicts (Pet. App. 40a-49a, 550 F.2d at 130-34). In particular, Judge Adams held that the trial judge's insistence on a verdict "one way or the other" violated the "cardinal principle" that a trial judge may not demand a verdict from a jury:

> "So long as the unanimous verdict is required in criminal cases, there will always be *three* possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) *no verdict* because of a lack of unanimity. The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. * * * [I]t is a cardinal principle of the law that a *trial judge may not coerce a jury to the extent of demanding that they return a verdict.*" Pet. App. 47a; 550 F.2d at 133, quoting *United States* v. *Fioravanti*, 412 F.2d 407, 416 (3rd Cir.), *cert. denied sub nom. Panaccione* v. *United States*, 396 U.S. 837 (1969) (emphasis and omissions in original).

*See also United States* v. *Angiulo*, 485 F.2d 37, 40 (1st Cir. 1973); *United States* v. *Scott*, 547 F.2d 334, 337 (6th Cir. 1977). The record concerning the jury's deliberations confirms Judge Adams' conclusion.

**A. The Trial Judge Made It Clear To The Jury That He Would Not "Accept" A Deadlock, But Required A Verdict "One Way Or The Other."**

The jury's sequestered deliberations initially lasted from 9:00 A.M. to 10:00 P.M. During the fourth day of such deliberations, the trial judge informed defense counsel that the long hours of deliberation were adversely affecting the jury. Defense counsel were told that "some of the jurors aren't feeling well" and "[s]ome are tired" (IV A. 1806). One or more jurors were "actually ill" one was suffering from chills, and a doctor was providing jurors with medication (IV A. 1807-1808). The court recognized that the deliberations were undoubtedly "a considerable strain" on a jury which included several elderly people (IV A. 1809).

The jury foreman was summoned and reported to the court, in the presence of counsel, that some jurors were "tired out," "two or three [were] crying," and the jury was concerned about being "away from home for a long time" (IV A. 1809). He added that one of the jurors ". . .realizes what a responsibility it is and she cannot find a way to find the answer" (IV A. 1809), and that "on the other side you will get some of the men who are losing money by this and they want to get the decision, but whether it can be reached or not with the women in that condition is hard to say" (IV A. 1809-1810). As a result of this report, the trial judge agreed to the jury's request to terminate each day's deliberations at 6:30 P.M. instead of 10:00 P.M. (IV A. 1810, 1812).

The following afternoon, the fifth day of sequestered deliberations, the jury transmitted to the trial judge several requests for additional instructions. In open court, the trial judge testily responded to one of these requests by admonishing: "Now I don't know why you don't understand that. I have told you that at the beginning of the case. I told you that at the end of the case and I am telling you that now" (IV A. 1813).



Then, without prior notice to counsel, the trial judge seized this opportunity to give—for a second time—a modified *Allen*-type instruction directing the jurors to continue to "deliberate with a view toward reaching an agreement" (IV A. 1815).[80] Defense counsel later expressed their concern to the court about the demanding tone in which the charge was given (IV A. 1820).

Late the following afternoon, on the sixth day of sequestered deliberations, the jury sent the court the following note:

> "Your Honor,
>
> We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors." (IV A. 1835).

In response to this note, the trial judge assembled the jury, defendants and counsel. After reading aloud only the first sentence of the note, and again without prior notice to counsel, the court gave yet a third "dynamite" charge (IV A. 1817-1818).[81] Although the court's two previous *Allen*-type charges had followed the language set forth in *United States* v. *Fioravanti, supra*, 412 F.2d at 420, this time the court omitted the key phrase "each of you must decide this case for yourself."[82] Moreover, the trial judge prefaced his instruction by

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[80] The trial judge first gave such an instruction at the conclusion of his final charge to the jury, on July 8, 1975 (IV A. 1767).

[81] Defense counsel were not apprised of the full contents of the jury's note until they requested and obtained a copy from the clerk the next day. Therefore, at the time of the trial judge's third "dynamite" charge, counsel were unaware that the jury had reported itself so hopelessly deadlocked that only "compassion for fellow jurors" would produce a unanimous verdict.

[82] This improper omission ran afoul of the principle that "the permissibility of a direction to jurors to re-examine their views in the light of those of their fellows is *dependent* upon the moderating reminder of their own individual responsibility and *the necessity that any verdict be that of each of the jurors . . .*" *United States* v. *Rogers*, 289 F.2d 433, 437 (4th Cir. 1961) (emphasis added). Significantly, *Rogers* was one of only three cases cited in support of this Court's decision in *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) (*per curiam*). *Fioravanti* similarly recognized the principle expressed in

(Footnote continued on next page.)

again scolding the obviously deteriorating jury, "I have told you before and I am going to tell you again. . ." (IV A. 1818).

Immediately thereafter, when the jury had retired for further deliberations, the trial judge announced to counsel that he had no intention of declaring a mistrial, that he was coming to the belief that "cutting off the deliberations at 6:30 at night" had been a mistake, and that he was "inclined to go back to the idea that they will . . . deliberate until 10:00" (IV A. 1818). Defense counsel objected to such a procedure and pointed out the potential adverse impact which it might have on the fitness of the elderly members of the jury. The trial court responded with the remark that the trial had been an "expensive matter" (IV A. 1818). Defense counsel then moved for mistrial on the basis of jury deadlock and exhaustion. The motion was summarily denied (IV A. 1819-1820).[83]

On the seventh consecutive day of sequestered deliberations, the trial court informed defense counsel of receipt of the following note:

"Your Honor,

May I as foreman of the Jury meet with you to discuss the condition of the Jury and further guidance?

G. W. Russell
Foreman"
(IV A. 1835, 1820).

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(Footnote continued from preceding page.)

*Rogers* by stating: "We are convinced that the traditional measure of proof in criminal cases envisions a 'subjective standard'—viz, *each individual juror must be convinced* of the defendant's guilt beyond a reasonable doubt." 412 F.2d at 419 (emphasis added).

[83] Before ruling on the mistrial motion, the court should have considered the deprivation of respondents' rights through coercion of the verdict. The trial judge's concern over the time and expense of a new trial was an insufficient reason for requiring further deliberations by jurors who, after five days of deliberation and three "dynamite" charges, continued to have reasonable doubts. *See United States* v. *Burley*, 460 F.2d 998, 1000 (3rd Cir. 1972).



The trial judge stated he would meet privately with the foreman and a court reporter, and would impound the transcript (IV A. 1820-1821). However, if any counsel objected to any aspect of this procedure, the trial judge would "merely write him [the foreman] a note and say no" to the request for a meeting (IV A. 1822). Thus, the trial court forced respondents to choose between deprivation of the right to be present at a critical stage of the proceedings, and rejection of the deadlocked jury's plea for guidance. Respondents were particularly concerned about the jury foreman's request to discuss "the condition of the Jury" in view of the jury's previously reported illness and exhaustion problems (IV A. 1821).[84]

Caught in that dilemma, respondents did not object to the limited meeting proposed by the trial judge (IV A. 1825). Defense counsel did, however, expressly object to the court's giving any further instructions, particularly "any repetition of the modified Allen charge," without prior notice or consultation, and the trial judge assured counsel he would not do so (IV A. 1822). The Court proceeded with the private meeting and impounded the reporter's notes thereof (IV A. 1827). Respondents did not learn what actually occurred in that conference until more than one month later, when, after appeals were taken, the Court of Appeals ordered disclosure of the transcript (IV A. 1835-1836).

During the meeting, the foreman told the trial judge that the jury's problems were "health and the status of the count" (IV A. 1837). The foreman made it absolutely clear, for the second time in two days, that the jury was hopelessly deadlocked:

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[84] Defense counsel articulated their concern for the jury's welfare as follows:

"MR. BARTLIT: I take it that Your Honor, the purpose is to find out if the jury is in serious physical condition.
THE COURT: That is right.
MR. BARTLIT: Mental or physical condition.
THE COURT: I think that is the purpose of it." (IV A. 1821).

"We have taken enough ballots now, and we have had enough discussions, and *the way it is divided is not going to be settled by any document, any remembrance of testimony.* It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no . . ." (IV A. 1838, emphasis added).

Later in the conference the foreman reaffirmed the jury's deadlock:

"MR. RUSSELL: I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.

"THE COURT: *Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?*

"MR. RUSSELL: *In my opinion, it is . . .*" (IV A. 1839, emphasis added).

Foreman Russell also painted a vivid picture of the severe physical and mental deterioration of the jury:

"MR. RUSSELL: . . . I would like to thank you for that 6:30 [termination of deliberations], because *I don't think you would have a jury left.* I am not a doctor, but these people are getting very distraught. It is not that they go into a depression and stay there; they go into a depression and they're coming out high. Now I would say at least eight of the jurors are taking some kind of pill. Some of the pills have even been issued by the doctor downstairs. I am not a doctor and I can't judge these things, but I have seen *one of these jurors at one time I thought she was going to jump out the window.* And I, just for my own sake, without telling you this, *I cannot take the responsibility that this could happen. . . .*

"THE COURT: May I ask this: If we discharged—we can excuse one juror for health reasons. *Is there any juror we could excuse that would help the situation? If it is more than that, there is no point.*



"MR. RUSSELL: I think there is more than that, Judge . . ." (IV A. 1837-1838, emphasis added).[85]

The foreman subsequently made a special point of repeating his concern with the jury's health:

"As I said, *the health problem is something that I think has to be looked at.* I don't know how you are going to judge this or whether you call Mr. Keene [the bailiff] and ask him or the Marshal's opinion, but *I think something ought to be done*" (IV A. 1839, emphasis added).

Notwithstanding the foreman's overriding concern for the deteriorating condition of the jury and the futility of further deliberations in breaking a hopeless deadlock, the trial judge told the foreman "[y]ou have not deliberated that long yet," and "jurors usually deliberate until eleven or ten at night" (IV A. 1839).[86] Again and again during their brief meeting, he emphasized to the foreman that the jury must keep deliberating:

"If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer—" (IV A. 1838).

"I would like this jury to deliberate longer" (IV A. 1839).

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[85] Respondents had stipulated to accept a verdict from an eleven-member jury early in the trial. The trial judge's suggestion to the jury foreman that one juror could be excused "for health reasons," and then simply dropping the subject upon learning that more than one juror might have to be excused, is further evidence of the trial judge's strong desire to break the jury deadlock even at the expense of respondents' rights.

[86] The needless remark that "jurors usually deliberate until eleven or ten at night" may have suggested to the foreman that the trial court was considering again extending the hours of deliberation into the late evening. On the previous day the trial judge had stated to counsel that he was in fact considering doing just that (IV A. 1818). The potential coercive impact of that suggestion is best illustrated by the foreman's own words that if the jury had continued late evening deliberation "I don't think you would have a jury left" (IV A. 1837). The Court of Appeals for the Fifth Circuit has ruled that a trial judge may not tell a jury about prolonged deliberations by other juries. *United States* v. *Amaya*, 509 F.2d 8, 11-12 (5th Cir. 1975).

"For the time being continue your deliberations" (IV A. 1839).

"I would like you to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say" (IV A. 1840).

"You tell them to keep deliberating and see if they can come to a verdict" (IV A. 1840).

These statements cumulatively constituted an improperly abbreviated "dynamite" charge. *United States* v. *Bass*, 490 F.2d 846, 854 (5th Cir. 1974).

The final exchange between the judge and the foreman confirms beyond question that, by this time, the jury was convinced the judge would not accept a deadlock, but wanted a verdict one way or the other:

"MR. RUSSELL: . . . It is a situation *I don't know how to help you get what you are after.*

"THE COURT: Oh, I am not after anything.

"MR. RUSSELL: *You are after a verdict one way or the other.*

"THE COURT: *Which way it goes doesn't make any difference to me.*

"MR. RUSSELL: They keep saying, 'If you will tell him what the situation is, *he might accept it.* . . . ' "(IV A. 1840 emphasis added).

However, the trial judge refused to accept the jury's decision that it was hopelessly deadlocked. Instead, he again instructed the foreman to tell the jurors "to keep deliberating and see if they can come to a verdict" (IV A. 1840).

After the private meeting with the foreman, the court reported to counsel that "the foreman has advised me that because of what he calls *personality differences* between some of the members of the jury . . . he does not feel that they are ever



going to be able to get over this,"[87] and "he also pointed out there are some of the people that are not feeling well, but he says he is not a doctor and he doesn't know if they are sick or aren't sick" (IV A. 1826, emphasis added). It was this report which Judge Adams found to be not "accurate or even substantially accurate" (Pet. App. 44a-45a, 550 F.2d at 132):

> "Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definite verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should 'see if [it] can come to a verdict.' " Pet. App. 44a, 550 F.2d at 132.

After the inaccurate report of the meeting with the jury foreman, the trial judge requested the views of counsel "as to how much longer I should let them deliberate" (IV A. 1827). The Government recommended that "we go through the rest of this week and the Court give serious consideration to going back to evening hours" (IV A. 1827). Respondents moved for an immediate mistrial because of the jury deadlock and the danger of a coerced verdict (IV A. 1827-1829). The trial judge "deferred" ruling on that motion, because he wanted the jury to continue deliberating for at least another three days (IV A. 1828).

Faced with the trial court's persistent refusal to accept their deadlock, the jury deliberated a few more hours after the judge's meeting with the foreman and returned, on the follow-

[87] Nowhere in the conference transcript did the foreman refer to "personality differences" as impeding deliberations. On the contrary, the foreman actually said that prior personality conflicts had been overcome (IV A. 1838). Nevertheless, when denying defendants' motion to release the impounded transcript, the trial judge reiterated that the foreman had "indicated . . . personality difficulties among some jurors" (I A. 58). He also said disclosure of the transcript would be improper because it would indicate "a particular juror's views," another assertion unsupported by the transcript (I A. 58).

ing morning, with guilty verdicts as to all respondents. At this point the trial judge ordered defense counsel not to speak to any juror (IV A. 1832-33).

**B. The Trial Court's Conduct Deprived Respondents of a Fair Jury Trial.**

**1. Instructions to the Foreman in a Private Meeting**

Meeting privately with the jury foreman, giving him instructions for the jury, and refusing to give respondents a transcript of the meeting (or even an accurate report of it), deprived respondents of their right to be present at every stage of the proceeding and to have any communications between the judge and jury made in open court with an opportunity to object. *Rogers* v. *United States*, 422 U.S. 35 (1975); *Shields* v. *United States*, 273 U.S. 583 (1927); *see* Fed.R.Crim.P. 43. In *Rogers*, the trial court, without informing counsel, responded through the marshal to a jury's question about the form of the verdict. This Court unanimously held that reversal was required, notwithstanding the failure of petitioner to object properly at the trial level, or to raise the issue in the Court of Appeals or before this Court. In *Shields*, this Court found reversible error in a trial court's private communication to the jury that it must reach a verdict.

Similarly, reversal was required in this case because the trial judge privately communicated to the jury foreman that he wanted a verdict "one way or the other" in the absence of defense counsel, and without even fairly reporting to defense counsel what had transpired.[88] The prejudice of this latter error

[88] The trial judge's private instruction to one member of the jury violated the principle that instructions should be given in open court to all jurors in order to make certain that each member of the jury accurately receives the instructions. *See United States* v. *Noble*, 155 F.2d 315, 318 (3rd Cir. 1946); *see also United States* v. *Gullia*, 450 F.2d 777, 779 (3rd Cir. 1971). In the present case, the form in which the jury foreman relayed the judge's remarks to the other jurors remains a total unknown.



was aggravated by the judge's impoundment of the transcript—an order reversed by a separate panel of the Court of Appeals (IV A. 1835-36).[89] Had respondents been given that transcript immediately, objections and requests for additional instructions could have been made "on the spot" in an attempt to correct the errors committed by the trial court, and to preserve important constitutional rights.

The Government claims that respondents "consented" to the meeting between the trial judge and the jury foreman (Gov. Br. 103). However, as this Court's decision in *Rogers* makes clear, privately giving instructions to the jury without fairly reporting this fact to defense counsel is plain error which cannot be "waived."

Moreover, respondents' "consent" was not freely given. The trial judge confronted respondents with the "Hobson's choice" of either foregoing their right to be present at the meeting with the foreman or forcing the ill and exhausted jury to continue deliberations with no response to their specific written request to inform the court of their condition. See *supra*, 70-71. Finally, respondents' "consent" was based upon the trial judge's assurance that he would not give the jury foreman a "dynamite" instruction (IV A. 1822). The trial judge violated that assurance and also failed to give defense counsel an accurate report of the meeting (see *supra* 71, 74-75), thus invalidating whatever consent had been given. In short, respondents' "consent" to the meeting itself did not give the trial judge a license to give coercive instructions during that meeting and then misrepresent to defense counsel what had transpired.

[89] The release of the transcript by the Court of Appeals establishes that the trial judge erred in impounding it. The Government never subsequently challenged that Court of Appeals' ruling, which thus has become the "law of the case." The trial judge's error, which related to respondents' substantial rights, "is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless* v. *United States*, 298 U.S. 342, 347-48 (1936) (emphasis added).

**2. The Trial Judge's Refusal to "Accept" The Jury's Hopeless Deadlock**

"[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) (*per curiam*).[90] In *Jenkins*, *supra*, at 446, the trial court's statement, "you have got to reach a decision in this case," was found to be coercive and to constitute plain error although the unsequestered jury had been deliberating only slightly more than two hours without any indication that illness, fatigue, exhaustion, or other physical or mental problems contributed to the coercive effect upon the jurors. *See Jenkins* v. *United States*, 330 F.2d 220 (D.C. Cir. 1964). Likewise, in *Bucklin* v. *United States*, 159 U.S. 682, 685-86 (1895), this Court found clear error in a trial judge's insistence on a verdict "one way or the other" for all defendants in that case.

The trial judge's repetitive "dynamite" charges in this case were more coercive than the instructions found erroneous in *Jenkins* and *Bucklin*, because here the charges were delivered to an ill and exhausted jury which had already reported itself deadlocked.[91] Indeed, the full coercive impact the trial court's

[90] Likewise, a trial judge may not *indirectly* coerce a verdict by requiring a deadlocked jury to continue deliberating when the verdict would be induced by illness, *United States* v. *Grosso*, 358 F.2d 154, 159-60 (3rd Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968); "sheer physical and mental exhaustion," *United States ex rel. Leguillou* v. *Davis*, 115 F.Supp. 392, 401 (D.V.I. 1953); or confusion and overwork, *Commonwealth* v. *Clark*, 404 Pa. 143, 140 A.2d 847 (1961).

Each of these circumstances prohibited by various courts—judicial insistence upon a verdict, excessive deliberations, illness, and exhaustion—affected the jury deliberations in this case. Moreover, these circumstances occurred in the presence of the "crucial factor" in determining whether a mistrial should have been declared: the jury's own statement on two separate occasions that it was hopelessly deadlocked. *United States* v. *See*, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *see United States* v. *Lansdown*, 460 F.2d 164, 169-70 (4th Cir. 1972).

[91] In *United States* v. *Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977), the Court held that "as a sound rule of practice it is reversible error to repeat an *Allen* charge in a federal prosecution in this Circuit after a jury has reported itself deadlocked and has not itself requested a repetition of the instruction."



successive "dynamite" charges had on the jury can only be understood in the context of these circumstances. *See Jenkins* v. *United States*, *supra*, 380 U.S. at 446.[92] The second "dynamite" charge was given after the jury was reported suffering from illness and exhaustion (see *supra*, 68-69). The instruction was accompanied by the trial judge's scolding of the jury for supposedly failing to understand his earlier instructions (IV A. 1813-1815), and was delivered in a demanding tone to which counsel objected (IV A. 1820).

The third "dynamite" charge was given in response to the jury's report that it was deadlocked and that "[i]f any juror changes his mind now, he would only change due to compassion for his fellow jurors" (IV A. 1835). The instruction was prefaced with the irritated assertion, "I have told you before and I am going to tell you again . . .", and omitted the important phrase "each of you must decide this case for yourself"[93] (IV A. 1817-1818; see *supra*, 69-70).

Most prejudicial of all, the fourth "dynamite" instruction consisted of repeated injunctions that the jury keep deliberating but omitted all of the protective language necessary to limit the coercive effect of such an instruction. See *United States* v. *Bass*,

[92] The Government agrees (Gov. Br. 104) that "[t]he determination whether a judge's remarks have coerced a jury must be 'in *** context and under all the circumstances.'" However, the Government's subsequent argument then proceeds to ignore all of the surrounding circumstances, particularly the critical fact that the jury, in unmistakable language, twice reported itself hopelessly deadlocked.

[93] ["T]rial courts should avoid substantive departures from the formulations of the charge that have already received judicial approval." *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971). The Seventh Circuit, the first to require use of a modified "*Allen*" charge like the one approved by the Third Circuit in *Fioravanti*, later found it necessary to require *strict* adherence by trial courts to the approved form or suffer reversal. *United States* v. *Silvern*, 484 F.2d 879, 883 (7th Cir. 1973); *United States* v. *Chaney*, 559 F.2d 1094, 1097-98 (7th Cir. 1977). The Fifth, Sixth, and D.C. Circuits have adopted similar rules. *United States* v. *Amaya*, 509 F.2d 8,12-13 (5th Cir. 1975); *United States* v. *Scott*, 547 F.2d 334, 336-37 (6th Cir. 1977); *United States* v. *Thomas*, 449 F.2d 1177, 1187-88 (D.C. Cir. 1971).

*supra*, 490 F.2d at 854. The instruction was reinforced by the judge's confirmation that he wanted a verdict "one way or the other" and would not "accept" a deadlock (IV A. 1838-40).[94] This fourth "dynamite" instruction was again given in response to the jury's own expression of a deadlock which was "not going to be settled by any document, any remembrance of testimony" (IV A. 1838-1839), and was delivered, over the prior objection of defense counsel, in a private conference with the jury foreman. The trial judge then deprived respondents of the opportunity to correct this error by impounding the transcript and delivering to defense counsel an inaccurate report of what had transpired.[95] None of the cases cited in the Government's brief involved facts even remotely comparable to the totality of the foregoing circumstances.[96]

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[94] The Government attempts to excuse the trial judge's final and most coercive "dynamite" instruction by referring to ameliorating language about surrendering conscientiously held views in the judge's previous *Allen*-type charges (Gov. Br. 104). "However, an earlier reference to the importance of individual jurors' consciences is inadequate to balance a later, powerful instruction intended to produce a verdict." *United States* v. *Scott*, 547 F.2d 334, 337 (6th Cir. 1977).

[95] Release of the transcript, or at least an accurate report of the meeting, would have permitted counsel to request that the trial judge specifically inform the jury of its right to disagree. Respondents would have been entitled to such an instruction as a matter of right in the First Circuit. *See United States* v. *Angiulo*, 485 F.2d 37, 40 (1st Cir. 1973). As *Angiulo*, *Amaya* (n. 86 & 93, *supra*), *Seawell* (n. 91, *supra*), *Silvern* (n. 93, *supra*), *Scott*, (n. 93, *supra*), and *Thomas* (n. 93, *supra*), demonstrate, the trial judge's erroneous use of the "dynamite" charge in this case would have compelled automatic reversal in the majority of the Circuits even without the additional strong evidence of coercion present in this case. Similarly, twenty-three States have disapproved the use of dynamite instructions in whole or in part. *See People* v. *Gainer*, 19 Cal. 3d 835, 566 P2d 997, 139 Cal. Rptr. 861 (1974), and cases cited at n.8 therein.

[96] In all but one of the cases cited by the Government, *United States* v. *Robinson*, 560 F.2d 507 (2nd Cir. 1977), either the jury had not reported a deadlock prior to receiving a "dynamite" instruction or the defendant had raised no objection, or both. None of the cases, including *Robinson*, involved even as many as three successive "dynamite" charges. The *Robinson* court itself recognized the significance of this fact by stating that "the chances of coercion may increase with each successive appeal by the court to the jurors to try to reach a verdict. . . ." 560 F.2d at 517.



This Court need not speculate about the coercive impact of the trial judge's conduct in this case, nor engage in a semantic analysis of the supposed "meaning" of the precise words used by the judge in his repetitive dynamite instructions (compare Gov. Br. 104-07). Here, the jury unequivocally stated, through the foreman, its understanding that the trial judge wanted a verdict "one way or the other" and that he would not "accept" a deadlock. As Judge Adams correctly observed, the trial judge did nothing to correct this understanding, but rather confirmed it:

> "In the present case, it is evident that the jury had the mistaken impression, for whatever reason, that it must reach a verdict of guilty or not guilty. Yet, that impression was in no way dissipated by the trial court in its conference with the foreman, or at any time thereafter. Indeed, the court's language seems to have confirmed the impression that a verdict of guilty or not guilty was required." Pet. App. 48a-49a, 550 F.2d at 134 (footnote omitted).

The jury in this case twice reported itself hopelessly deadlocked in words which could not have been more forceful and plain. The verdicts were ultimately reached long after the jury expressly stated that it had ceased considering the evidence. Respondents are thus entitled to a new trial.

## CONCLUSION

The judgment of the Court of Appeals reversing respondents' convictions should be affirmed.

In addition, this Court should indicate that if any retrial occurs, respondents are entitled to jury instructions on information exchanges which state the law as it existed at the time respondents' exchanges took place.

Respectfully submitted.

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